86-1169

Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

LAWRENCE R. ROSANO,

Petitioner,

vs.

THE UNITED STATES, OFFICE OF PERSONNEL MANAGEMENT, DEPARTMENT OF THE NAVY, MERIT SYSTEMS PROTECTION BOARD, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the offering of Federal Employees' Health Insurance Premium Benefits (FHB), which included the religiously offensive, but mandatory, abortion and contraception coverage, to the petitioner, a Roman Catholic, constitutes a denial of his First Amendment right to the free exercise of religion.

2. Whether petitioner, as a probationer, was entitled to MSPB jurisdiction for committing insubordination, due to his exercising his First Amendment right to petition the government for a redress of grievances, as well as other reasons.

3. Whether Claims Court and/or MSPB had jurisdiction based on denial of enrollment into the FHB, which was Constitutional, and/or under 5 U.S.C. 8912.

4. Whether all Justices who assented to legalize abortion, and/or the governmental funding thereof, must recuse themselves because no judge may hear and decide a self-incriminating case.

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IN THE SUPREME COURT
OF THE UNITED STATES

LAWRENCE R. ROSANO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

The petitioner, LAWRENCE R. ROSANO, pro se, respectfully prays that a Writ of Certiorari issue to review the judgement and opinion of the U.S. Claims Court, affirmed by the U.S. Court of Appeals for the Federal Circuit (CAFC), entered in this proceeding on November 6, 1985, affirmed on September 16, 1986.

OPINIONS BELOW

On August 20, 1980, the Presiding Official entered his decision on the instant case. The Merit Systems Protection Board (MSPB) affirmed that decision on December 12, 1980, and petitioner appealed to the Court of Claims, but only on the federal health benefits (FHB) issue, *ROSANO v. U.S. Marine Corps,* 10 M.S.P.B. 67, *ROSANO v. U.S. Marine Corps* (ROSANO I), 229 Ct.Cl. 780 (1982), leaving the termination in limbo. In 1982, the case was transferred to the Court of Appeals for the Federal Circuit (CAFC) which on November 14, 1983 entered an adverse decision, *ROSANO v.*

Department of NAVY (ROSANO II), 699 F.2d 1315 (1983). In 1983 the district court of So. Calif. entered a one sentence decision of the nature of a conclusion; and C.A. 9th Cir., unpublished, affirmed, *ROSANO v. Secretary of NAVY* (ROSANO III), 735 F.2d 1372 (1984); 469 U.S. 855 (1984), cert. denied. The Claims Court entered decision on November 6, 1985 at *ROSANO v. U.S.*, 9 Cl.Ct. 137 (1985), and the Court of Appeals for the Federal Circuit (CAFC) affirmed that decision on September 16, 1986 at 800 F.2d 1126 (1986). Petitioner handled the latter two cases, pro se, and never received an oral hearing.

JURISDICTION

The judgement to be reviewed is the November 6, 1985 opinion and order of the U.S. Claims Court which denied jurisdiction over the instant case, and which was affirmed by the CAFC on September 16, 1986. Justice William H. Rehnquist granted petitioner an enlargement of time for his Petition for a Writ of Certiorari up to, and including, January 14, 1987. Jurisdiction of this Court is based on 28 U.S.C. 1254.

CONSTITUTIONAL, STATUTORY AND OTHER PROVISIONS INVOLVED

Constitution of the United States, Amendment I

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Appendix A, Chapter 89, Title 5, United States Code, 5 U.S.C. 8902(f) — Health Insurance

"(f) A contract may not be made or a plan approved which excludes an individual because of race, sex, health status, or, at the time of the first opportunity to enroll, because of age."

"5 CFR 890.201 Minimum standards for health benefits plans

(a) To be qualified to be approved by OPM, a health benefits plan shall:

(1) Comply with chapter 89 of title 5, United States Code, and this part, as amended from time to time.

(2) Accept the enrollment, in accordance with this part, and without regard to age, race, sex, health status, or hazardous nature of employment, of each eligible employee and annuitant except that a plan which is sponsored or underwritten by an employee organization may not accept the enrollment of a person who is not a member of the organization, but it may not limit membership in the organization on account of these prohibited factors. The carrier may terminate the enrollment of an employee or of an annuitant, other than a survivor annuitant, in a health benefits plan sponsored or underwritten by an employee organization on account of termination of membership in the organization..."

5 U.S.C. 8912 Jurisdiction of courts

"The district courts of the United States have original jurisdiction, concurrent with the United States Claims Court, of a civil action or claim against the United States founded on [chapter 89-Health Insurance.]"

STATEMENT OF THE CASE

On November 5, 1979, petitioner began appointment at Camp Pendleton, California at the Public Works Office as a probationary GS-11 civil engineer (A25). On November 7, during orientation still, he was presented with four Federal Employee's Health Insurance Premium Benefits (FHB) policies, each of which included the religiously offensive, but mandatory, abortion and contraception coverage, whereby the U.S. pays about one half of the cost, as the "government's share", the petitioner the rest, as the "employee's" share.

He realized that the U.S., as a conditon of employment, forced him to choose between violating religion, or else be punished for not doing so by being denied FHB without coverage for murder (A28-40A, 61-63). Since he was led to believe this entitlement to do so at A27,-28, referring to A75,-76, petitioner requested several, but was denied all, accommodations to the FHB by the Civilian Personnel Office (CPO) (A25,27-28,-40, A61-63) who referred him to seek it on his own to the Office of Personnel Management (OPM) in Washington, D.C. because CPO lacked jurisdiction, an excuse held by the local Equal Employment Opportunity Office (EEO) in January, 1980 (A32, A63,-64) and finally by the "proper" (according to EEO) Office of Special Counsel (OSC) to the MSPB on April 7, 1980 (A77-86), after which he became insubordinate in order to petition the U.S. for a redress of grievances, himself (see A5,-21), because he was unable to file with anyone in authority, his right to petition, thereby, abridged. On May 30, 1980 petitioner was fired for doing so, allegedly, based on poor performance, while the EEO found that reason unsupported (A42) and the U.S. admitting insubordination at A16-17, while no court has done so. Neither has any court ever considered and decided the FHB issue in question.

Rosano now timely files this Petition for a Writ of Certiorari and prays that a writ issue on the following grounds:

REASONS FOR GRANTING THE WRIT

Petitioner respectfully submits that his petition should be granted because the United States Claims Court, with the CAFC affirming, "has decided a federal question of substance in a way in conflict with applicable decisions of this Court." Rule 17.2. Rules of the Supreme Court. In upholding the denial of Federal Health Benefits (FHB) without the religiously offensive, but mandatory, coverage in question, to the petitioner, the United States Claims Court clearly departed from the holding in *Thomas v. Review Board of Indiana Employment Security Division et al*, 450 U.S. 707 (1981), hereinafter, known as *"Thomas v. Review Board"*, which controls this case.

In *Thomas*, after a year of satisfactory work in the Roll Foundry, Thomas was transferred to another department where he began working in the production of turrets for tanks. Upon commencing his new job in that department, Thomas realized that this new job was in direct and serious conflict with his religious beliefs as a Jehovah's Witness. Thomas' religious beliefs prohibited work with armaments or items used in the advancement of war. After realizing that all other departments of the company were engaged in the production of items used in the advancement of war, and after unsuccessfully attempting to obtain a lay-off, Thomas voluntarily terminated his employment in accordance with his religious beliefs. The administrative hearing that followed accepted the fact that the " '(c)laimant did quit due to his religious convictions...' (but) the referee concluded nonetheless that Thomas' termination was not based upon a 'good

cause [arising] in connection with [his] work,' " *Thomas*, supra, p. 712. The state Supreme Court affirmed that decision and Thomas appealed to the United States Supreme Court, contending that the disqualification abridged his First Amendment right to the free exercise of religion.

In *Thomas*, this Court stated:

> "(M)ore than 30 years ago, this Court held that a person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available governmental program. A state may not 'exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation.' " *Thomas*, supra, at p. 716 (citing *Everson v. Board of Education*, 330 U.S. 1,16 (1947)).
>
> "(T)he ruling [disqualifying Mrs. Sherbert from benefits because of her refusal to work on Saturday in violation of her faith] forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against [her] for her Saturday worship.' " *Thomas*, supra, at 716,-17 (citing *Sherbert v. Verner*, 374 U.S. 398, 404 (1963)).

The state Supreme Court, however, held that "Indiana requires applicants for unemployment compensation to show that they left work for 'good cause in connection with the work", 450 U.S., 717, holding Thomas was not when he quit.

"Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religous faith, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial." *Thomas*, 450 U.S., at 717-718.

"(T)he respondents also contend that *Sherbert* is inapposite because, in that case, the employee was dismissed by the employer's action. But we see that Mrs. Sherbert was dismissed because she refused to work on Saturdays after the plant went to a 6-day workweek. HAD THOMAS SIMPLY PRESENTED HIMSELF AT THE BLAW-KNOX PLANT TURRET LINE BUT REFUSED TO PERFORM ANY ASSIGNED WORK, IT MUST BE ASSUMED THAT HE, LIKE SHERBERT, WOULD HAVE BEEN TERMINATED BY THE EMPLOYER'S ACTION, IF NO OTHER WORK WAS AVAILABLE. In both cases, the termination flowed from the fact that the employment, once acceptible, became religiously objectionable because of changed conditions." *Thomas*, supra, at 718.

On the other hand, this Court offered the only criteria for holding against Thomas, as follows:

"(T)he mere fact that the petitioner's religious practice is burdened by a governmental program does not mean that an exemption accommodating his practice must be granted. The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest. However, it is still true that '(t)he essence of all that has been said and

> written on the subject is that only those interests of the highest order....can overbalance legitimate claims to the free exercise of religion.' " *Thomas*, supra, at 718 (citing *Wisconsin v. Yoder*, 406 U.S. 205, at 215 (1972).

Because the state offered no compelling state interest, this Court held for Thomas.

The decision of the U.S. Claims Court at A1-15 is in direct conflict with *Thomas* and must be reversed. Assuming arguendo that unemployment compensation benefits to be equivalent in nature to FHB, the decision reached in Rosano's case which presented the "same" federal question involved in *Thomas*, must not stand because it erroneously decides an issue already decided by this Court.

In *ROSANO v. U.S.*, 9 Cl.Ct. 137, 143 at A-11 (1985), the Court held this:

> "Since plaintiff (ROSANO-petitioner) chose to pay his health insurance premiums voluntarily and the federal government acted only as a conduit for turning over the premiums to the carrier, the substantive jurisdiction of the court to award to plaintiff a money judgement against the government cannot be based upon the government having taken plaintiff's money in contravention of the Constitution, a statute or a regulation."

The CAFC, erroneously, held the same, as follows:

> "There is no question that the NAVY performed its obligation to give petitioner full opportunity to choose any existing plan for which he was eligible." *ROSANO II*, 699 F.2d 1315, 1319 (1983)

Petitioner was eligible (see A27-29, -75, -75) to receive a Constitutional FHB, and the U.S. may only offer FHB which is constitutional, and is prohibited to do otherwise. Therefore, by saying "the federal government acted only as a conduit for turning over premiums to the carrier", as cited above, at A-11 the claims court made the erroneous decision-that the FHB was "constitutional"; while at the same time denying it had the jurisdiction to do so in *ROSANO v. U.S.*, supra. Or, it was like the claims court erroneously held constitutional the notion that the government may "hold a search light" to Blue-Cross *converting* money from petitioner, and similarly situated, spent in violation of the petitioner's religious beliefs, therefore, the government is not responsible if the FHB is, or is not, constitutional.

> "Having created a plan whereby employees can obtain the advantages of using deferred compensation to purchase an annuity (or, as in *ROSANO*, FHB) only if they invest in one of the companies specifically selected by the State, the State cannot disclaim responsibility for the discriminatory features of the insurer's options... Since employers are ultimately responsible for the compansation .... of employment provided to employees, an employer that adopts a fringe-benefit scheme that discriminates among its employees on the basis of ... religion ... violates Title VII regardless of whether third parties are also involved in the discrimination."

Arizona v. Norris, 463 U.S. 1073, 1089 (1983)

> "(I)t would be inconsistent with the broad remedial purposes of Title VII to hold that an employer who adopts a discriminatory fringe-benefit plan can avoid liability on the ground that he could not find a third party willing to treat his employees on a nondiscriminatory basis. An

> employer who confronts such a situation must either supply the fringe benefit himself, without the assistance of any third party, or not provide it at all." Id., at p. 1090.

Nevertheless, this Court must not let stand this decision by the claims court which, erroneously, decides the same issue that was decided by this Court in *Thomas*. A-64-67

Petitioner's case presents a situation strikingly similar to *Thomas*. On November 7th, 1979 petitioner was offered a choice to enroll into the FHBP.

The FHBP in question, like in *Thomas*, "forces (him) to choose between following the precepts of his religion, and forfeiting benefits, on the one hand, and abandoning one of the precepts of (his) religion in order to accept work, on the other hand," *Thomas*, supra, at 716-717.

In *Thomas*, in clearer and more precise terms, the unemployment compensation benefits' (UCB) program forces him to choose between refusing to accept violating religion and forfeit UCB, on the one hand, and accept violating religion in order to accept work (employment opportunities) some of which would force him to violate religion.

In *ROSANO* following *Thomas*, this Court would find impermissible the ruling [disqualifying petitioner-ROSANO from consideration of his Beneficial Suggestions Award (see the least amount of award at A-52) by the OSC at A77-85, by the OPM at A87-89, and by the Beneficial Suggestions' Award Committee at A-49, because of his religion] forces him to choose between refusing to accept violating religion and forfeit a Beneficial Suggestions' Award, on the one hand, and accept violating religion in order to accept work or federal employment at Camp Pendleton, which forced petitioner to

choose between refusing to accept violating religion and forfeiting FHB, on the one hand, and accept violating religion in order to accept the FHB program, some, or all, policies of which would force him to violate his religion.

Even though most, if not all, health insurance companies include religiously offensive and mandatory abortion (see A-73) and contraception coverage, "(A)n employer who confronts such a situation must either supply the fringe-benefit himself, without the assistance of any third party, or not provide it at all." *Arizona v. Norris*, supra, at 1090.

Conclusively, then, even had petitioner not enrolled into the FHBP, working at Camp Pendleton would *still* force him to choose between refusing to accept violating religion and forfeiting FHB, on the one hand, and accept violating religion in order to *accept* the FHB program, some, or all, policies of which would force him to violate his religion.

Conclusively, then, by refusing to accept violating religion, petitioner is punished in either of three ways: be denied a Beneficial Suggestions' Award at A-49 -52, be forced to quit federal employment, altogether, or acquiesce to federal employment which accepts, and practices, funding the murder of all maternally-unwanted unborn life, especially, in view that petitioner worked for the Department of "Defense" and be denied the non-offensive-to-religion benefits to the FHB in question, and consequently, pay a lot more in health insurance premiums, with much less benefits by enrolling in a non-group outside health insurance plan. "Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against [her] for her Saturday worship." *Thomas v. Review Board*, 450 U.S. at 717 (citing *Sherbert*, supra, at 404).

Petitioner has shown clear burden upon his free exercise of his religion in the Beneficial-Suggestions'-Award-, and in the FHB-, program, as well as in his employment at Camp Pendleton. However, he must finally show that the U.S. can not show "some compelling state interest" to justify this inroad to his religious liberty.

In all Courts, below, the U.S. has failed to identify or assert *any* compelling state interest justifying the conditioning of petitioner's FHB's upon his acceptance of the religiously offensive coverage in question.

In *Thomas*, violating his religious beliefs in question, which is not shared by the majority of Witnesses, is the direct participation in the production of items, visibly identified as related to armaments, through his work — to be later, POSSIBLY, used in war, to destroy human life, the opposition to the destruction of which is a protected religious belief under his conscientious objector (C.O.) status by Congress (section 6j), or else, end up as scrap at a military base. Nevertheless, Thomas did not use his religious belief as a C.O. to challenge the UCB refree, not having established the needed nexus for doing so, whereas ROSANO does, as follows:

> "(T)o qualify as a conscientious objector, the applicant must establish that he is opposeed to war IN ANY FORM..., that his opposition is based upon religious training and belief, and that his objection is sincere... Once the applicant has asserted a prima facie claim for conscientious objector status, the burden SHIFTS TO THE GOVERNMENT to demonstrate a 'basis in fact' for DENIAL of his application. Judicial review under the 'basis in fact' test is 'the narrowest review known to law.' The reviewing court does not weigh the evidence to support the military authorities' DENIAL of the appli-

> cant's request for conscientious objector status. *Witmer v. U.S.*, 348 U.S. 375,380 (1955) Rather, the court 'search[es] the record for some affirmative evidence' to support the authorities' overt or implicit finding that the applicant 'has not painted a complete or accurate picture of his activities.' ....Put another way, the reviewing court should look for 'some proof that is incompatible with the applicant's claims.' "

Taylor v. Claytor, 601 F.2d 1102,1103 (9th Cir. 1978)

Like Thomas, too, petitioner claims a Conscientious Objector's status (C.O.), although de facto, to disassociate himself from supporting through FHB premiums the religiously offensive coverage in question which directly and seriously destroys human life, although solely unborn (see A-28-30). Petitioner, based on religious conviction, found to be sincere and based on protected beliefs at A-28,-40, believes that this country is at war on the unborn which is legalized abortion and contraception, in any form, according to petitioner's definition of "abortion" at A-73. Petitioner referred to abortion as "war" in March, 1980 at A-64,-67.

Therefore, petitioner has chosen "war" in any form to be the "War on the Unborn", and is so opposed to this War on the Unborn "in any form".

Since U.S. has accepted that petitioner's belief is based on religion and is sincere at A-28, the U.S. has thereby affirmed the government's *denial* of FHB without the religiously offensive coverage in question, as of November 7, 1979, according to this admission.

In fact, the U.S. did not deny, and thereby admitted, all petitioner's averments in his complaint, only denying claims

court jurisdiction to consider them (A-17). However, by admitting that abortion is murder, and contraception is constructive murder in petitioner's complaint, all of which was mandatory coverage in the FHBP, the U.S., thereby, admitted petitioner was denied a constitutional FHB, even though offered an unconstitutional FHB. By reason, then, in view that the FHBP was unconstitutional, petitioner *was*, therefore, DENIED enrollment into a Constitutional FHBP.

Based on this U.S.'s denial of FHB to petitioner, the claims court admitted its jurisdiction over FHB issue based on *ROSANO v. U.S.*, supra, at p. 144 at A-14, which held:

> "Nor can any right to compensation under these circumstances be determined from the regulations governing the FHB. Section 890 of 5 C.F.R. deals with eligibility for enrollment and actions 'reviewing a claim denied by a plan.' There is no 'fair interpretation' that an employee can sue for money, *ABSENT A DENIAL OF ENROLLMENT* or benefits under a plan, merely because he objects to the plans in the program."

The CAFC held the same criteria which gave the MSPB jurisdiction over the FHB issue, as follows:

> "(P)etitioner is attacking a decision of OPM, but is it one of the certain decisions reviewable by the board? To decide this we must look beyond the general regulation to the regulations governing the FHB program..... The FEHB regulations ... cover only decisions 'refusing to permit registration for...enrollment ... under health benefits plans.' "

ROSANO II, 699 F.2d at 1319 (CAFC 1983)

Therefore, the MSPB would have jurisdiction upon a showing that Petitioner was denied enrollment to the FHBP, raised as an affirmative defense, including his C.O. argument, especially, referring to "war in any form".

Therefore, in *ROSANO* following *Thomas* (stated before), the religious beliefs in question, and those of his entire class and/or some beliefs of which are NOT SHARED BY THE MAJORITY OF HIS CLASS, is opposed to the direct participation in the production of, and by FHB premium payments for, ABORTIONS and CONTRACEPTION in the FHB program through that portion of his FHB premiums used in the War on the Unborn to destroy maternally-unwanted unborn life, the opposition to the destruction of which is a protected religious belief under his "C.O." status by Congress (section 6j). Therefore, ROSANO's religious belief relates, directly, to his "C.O." status by Congress; making *ROSANO* much stronger than *Thomas*.

Furthermore, contrary to Thomas' work "possibly" used to destroy human life, ROSANO's FHB premium portion was "certain" to do so, although to destroy human life, solely unborn, according to his religious beliefs as a Roman Catholic at A-28,-40. Simply stated, if it did not collect any money from FHB premiums to pay for abortion and contraception, per se, related services, administrative costs and fees, Blue Cross would not offer the coverage in question, and since the cost is spread out among participants in the group, ROSANO paid for the religiously offensive coverage in question by conversion of a portion of his FHB premiums through the FHB program by the U.S. who collected the FHB premiums out of his paycheck, biweekly, without ROSANO's permission, as of November 13, 1979.

CONCLUSIONS BASED ON *THOMAS*

The direct implication of this *Thomas* analysis is that no FHB offered could Constitutionally include this religiously offensive coverage in question. As this condition exists in state and federal employment, at present, all prolife government employees could quit, based on infringement to their free exercise rights, and the government would have to award them backpay up until the time the law suit was settled; awarded money in backpay for doing nothing. The implications for this Court sitting on this issue are enormous, once the prolife community became aware of this proposed prolife strike based on *Thomas*.

This Court held that "had Thomas simply presented himself (at work) ... but refused to perform any assigned work (if the employer did not offer, or if the employee could not find, any accommodation to his religious beliefs in question)", *Thomas*, supra, at 718, this Court would hold that Thomas did so due to his religious convictions "based upon a good cause [arising] in connection with [his] work", *Thomas*, at 712.

In *ROSANO*, after November 7th, 1979, following *Thomas*, then, any work petitioner did do, assuming arguendo, no matter how deficient, or how long it took to complete his assigned civil engineering projects, only served to delay his termination, but in no way contributed to it.

And, what makes *ROSANO* even stronger than *Thomas* is while Thomas, as well as Sherbert, were *prohibited*, ROSANO was *forced*, to work for the governmental benefit in question, entangled in the tenticles of religious discrimination for doing so, attempting to extricate himself as a result,

and consequently, terminated from government service for following the dictates of his conscience, explicitly supported by the CEFGS at A-28-30,33,-40.

GOVERNMENT SHARE

In addition, petitioner and other prolifers, as taxpayers of the entire nation, had to pay, likewise, through the "government" share of FHB premium, entitled to join petitioner's class under *Flast v. Cohen*, 392 U.S. 83 (1968) where this Court held that a taxpayer has standing in federal court to sue the government based on appropriations which are used in violation of the free exercise and establishment clauses to the First Amendment, having shown how the needed nexus is established, being that any prolife person wishing to join the federal government ranks must be, impermissibly (as held by this Court), forced to choose between refusing to accept violating religion and forfeit FHB, on the one hand, and accept violating religion in order to accept work, on the other hand, discouraging Catholics, and other prolifers, from government service. See A66-69.

BILL OF ATTAINDER

This Court reviewed a case, after the Court of Claims did so, in *U.S. v. Lovett*, 328 U.S. 303,307 (1946) which held that "legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group, in such a way as to inflict punishment on them without a judicial trial, are bills of attainder prohibited by the Constitution. Adherence to this principle requires invalidation of section 304. We do adhere to it," and mentioned that "(t)he section is not challenged on the ground that it violates the First Amendment" at Id., 307, which proves that the claims court has jurisdiction over petitioner's, and his class', claim.

The type of discrimination of the type considered in the claims court in *ROSANO* follows *Lovett*, as follows:

> "If Section 304 is valid, Congress can disqualify for public office or service racial minorities, POLITICAL (Right to Life Party of New York) minorities, and probably, RELIGIOUS minorities."

Lovett v. U.S., 66 F.Supp. 142,151 (concurring) (1945)

Based on this, above, petitioner, as a member of the de facto national Right to Life Party, and/or New York State one, had MSPB jurisdiction over discrimination against him, even as a probationer. Since a partisan political belief, here (RTL party), is equivalent to a religious belief, the MSPB order of December 12, 1980 at A-47,-48 is clearly eroneous, since that decision dismissed for lack of jurisdiction petitioner's appeal from termination during probation based on "religious discrimination", or partisan political discrimination. See 5 C.F.R. 315.806(b) at A-54.

Also, this Court let stand the decision by the C.A. (9th Cir.) in ROSANO III at A-20,-21, 469 U.S. 855 (1984), cert. denied, which held no discrimination of the type considered in district court existed. And, in *Lindahl v. OPM*, 470 U.S. 768,792 at footnote #29 (1985), this Court stated this:

> ".7703(b)(2) provides that cases of discrimination shall be filed in either a district court or the Claims Court, depending on which antidiscrimination statute is at issue;"

Therefore, the Claims Court in *ROSANO v. U.S.*, supra, at 142, At A-8, is erroneous when it held that discrimination ALWAYS goes to district court.

The U.S. admitted all discrimination cited in ROSANO's complaint to exist, only denying Claims Court jurisdiction to consider it at A-17.

Assuming arguendo the same issues of discrimination raised in ROSANO III at A-20,-21 were raised in this case, then, by legal subtraction, the U.S. Claims Court has jurisdiction according to this Court; if not based, exclusively, on 5 U.S.C. 8912, because district court and Claims Court have concurrent jurisdiction. And, if this case includes more discrimination issues than ROSANO III, and even if of the type considered in district court, the Claims Court, nonetheless, has jurisdiction, according to the following:

Quinault Allottee Assoc. v. U.S., 453 F.2d 1272, 14 ALR Fed. 751 (Ct.Cl. 1972), held jurisdiction of (claims court) over class action where recoverable amount of money in controversy is so small (FHB portion) compared to litigation costs, as to discourage, if not foreclose, individual suits in district court where concurrent jurisdiction exists; then, under Tucker Act, in *ROSANO*, under 5 USC 8912. *Quinault* held, also, that the members of the class need not join the suit officially to receive the settlement damages, 14 ALR Fed 752.

Considering district court type discrimination petitioner's condition was similar to that of petitioner in *Weiss v. U.S.*, 595 F.Supp. 1050,1056 (D.Va. 1984), which held this:

> "(R)eligious harassment, like sexual harassment, can take many forms, but there are two basic varieties: harassment that creates an intimidating, offensive environment ("condition of work"), and *"quid pro quo"* harassment, in which a supervisor demands that an employee alter or renounce some religious belief in exchange for job benefits. See *Katz v. Dole*, 709 F.2d 251 (4th Cir. 1983)."

In *ROSANO*, both types existed, arising from the FHB Act, based on a federal civil service regulation and statute.

> "(H)owever, an employer cannot use an employee's diminished work performance as a legitimate basis for removal where the diminution is the direct result of the employer's discriminatory behavior. *Henson v. City of Dundee*, 682 F.2d 897,910 (11th Cir. 1982); *DeGrace v. Rumsfeld*, 614 F.2d 796,804 (1st Cir. 1980)." Id., at 1057.

Nevertheless, this Court must reverse *ROSANO v. U.S.*, supra, which, erroneously, decided the same issue in *Thomas*-WITHOUT A JUDICIAL TRIAL on the merits, thereby creating a "JUDICIAL" bill of attainder.

MSPB JURISDICTION

Contrary to the MSPB order of December 12, 1980 at A-47,-48, the MSPB had jurisdiction over petitioner's termination during probation, as follows:

(i) The choice of whether to enroll into the FHBP was a religiously offensive, but mandatory, condition arising prior to appointment, as a bill of attainder (5 C.F.R. 890.201(a)(2)), and/or as a violation of petitioner's free exercise right under *Thomas*.

(ii) Petitioner's termination during probation was based, in whole, on this condition arising prior to appointment, above, according to the following:

While the Claims Court did not state so in *Rosano v. U.S.*, 9 Cl.Ct. 137 (1985), the U.S., affirmatively, admitted on September 23, 1985 in its Reply to Petitioner's Opposition to the U.S.'s M for S J at A-16,17 (S-210) that the reason for

petitioner's termination was insubordination, not "poor performance", as follows:

> "(I)t is clear that he (Rosano-petitioner) was discharged because he was devoting substantially all of his on-duty time to challenging the Government health insurance system, rather than performing his assigned duties."

Therefore, petitioner's removal was based on the legality of excluding abortion coverage from the FHBP, over which jurisdiction lies under 5 U.S.C. 8912, on the authority of *AFGE v. Devine*, 525 F.Supp. 250 (D.D.C. 1981).

Petitioner went insubordinate post April 7th (see A-3,-21), as indicated in, based on, and after which was written his April 16, 1980 appeal letter (S172-180), indicated at A-29 which implies this:

> "(i)t might be held that firing a person for writing a letter complaining about (religious) discrimination was itself (religious) discrimination, but the Miller letter at least does not in terms make that complaint, and no one seems to have thought of that theory."

Jackson v. U.S., 192 Ct.Cl. 765,771 (1970)

> "(I)t said that plaintiff could not invoke *Swaaley* (*Swaaley v. U.S.*, 180 Ct.Cl.1, 376 F.2d 857 (1967)), because he was a probationer. This is obviously incorrect: the constitutional protection of employees against removal because of petitioning for redress of grievances does not depend on the particular employee's status or tenure.... If, however, the (U.S., Claims Court, and the CAFC) means that an agency, incensed over an employee's petition for redress of grievances, may fire

him without regard to the *Swaaley* precedent, simply by saying it is firing him for some other alleged reason (as in *ROSANO*, "poor performance"), the statement is its own refutation." Id., at 192 Ct.Cl. 772

"(T)he probationary period was designed to deal with performance and conduct deficiencies. Those employees who cannot properly shoulder the normal burdens of their position in this one-year period are ordinarily to be separated rather summarily. On the other hand, situations which do not involve the performance or conduct of employee after appointment, do not come within the purposes for which the probationary period was created, and the employees affected are treated as if their positions were permenent", *U.S. v. Cohen*, 384 F.2d 1001, 1003-04 (Ct.Cl. 1967).

In view that petitioner was terminated due to insubordination, admitted at A16-17, not poor performance, and therefore *U.S. v. Cohen*, supra, controls, petitioner is entitled to MSPB jurisdiction, based on that alone, entitled to raise all his grievances as an affirmative defense.

Therefore, the Claims Court holding in *ROSANO v. U.S.*, supra, at p. 143 (A-11), must be reversed because Congress never specifically negated the application of the First Amendment right to petition the government for a redress of grievances to petitioner, and Congress could not do so without showing some compelling state interest to justify this inroad to petitioner's religious freedom, according to *Thomas*.

In *ROSANO*, the Claims Court's conclusion "(t)hat *Jackson* and *Swaaley* no longer support Claims Court jurisdiction" at A-11 must be reversed.

Concerning the effect of the Civil Service Reform Act of 1978 (CSRA) on First Amendment free speech rights, which this case involves, the Court of Appeals (D.C. Cir.) held this:

> "(W)here newly enacted statutory remedies are unavailable to a particular segment of employees, the Supreme Court appears to have imposed a kind of 'clear statement' requirement on Congress, requiring it to indicate explicitly its intent to displace judicially-created remedies for constitutional deprivations. See *Carlson v. Greene*, 446 U.S. 14,18-19 (1980); *Davis v. Passman*, 442 U.S. 228,246-47 (1979)."

Borell v. U.S.I.C.A., 682 F.2d 981,989 (1982).

In *Borell*, the government advanced the same argument as the U.S. did in *ROSANO v. U.S.*, supra, by stating "(t)he CSRA preempts all alternative remedies for all employees, even those preexisting judicial remedies based upon the Constitution which have not been replaced by administrative appeals or judicial review of any kind." Id., at 989.

However, considering the exercise of the free speech rights as whistleblowing, the C.A. (D.C. Cir.) stated this:

> "(I)t seems clear to us that Congress intended the CSRA to provide *additional*, not decreased, protection for federal employees who blow the whistle on illegal or improper governmental conduct." Id., at 990.

Therefore, petitioner has jurisdiction under *Jackson* and *Swaaley* in claims court. Unlike *Borrell*, however, petitioner has proven that (his) discharge was caused by (his) first amendment activities rather than (his) poor performance." Id., 991.

Therefore, this Court appears to have imposed a kind of "clear statement" requirement on Congress, requiring it to indicate explicitly its intent to displace judicially-created remedies for constitutional deprivations, *Carlson v. Greene*, 446 U.S. 14 (1980), as in *Swaaley*, *Jackson*, *Quinault*, *Lovett*, and *Flast v. Cohen*, contrary to claims court. Congress has not done so, however.

In rejecting petitioner's raising claims court jurisdiction based on 5 U.S.C. 8912 at A13-14, the claims court realized, first, at A13 that "(t)he legislative history of the later act (FHBA) is silent on the intention of Congress", upon which it, then, created an erroneous judicial doctrine by applying Congressional intent related to the Federal Employee Life Insurance Act (FLIA) to that of the silent Congressional intent related to FHBA, thereby, applying the lesser rights which pertains to non-contributory, non-federal employees (in FLIA), to the FHBA which pertains to contributory, federal employees; and, then, applied the Plain Words' theory, prohibited by this Court in *Lindahl v. OPM*, 470 U.S. 768 (1985), to deny jurisdiction. Therefore, this Court is petitioner's only hope for claims court's erroneous use of this erroneous judicial doctrine, and prohibited use of the Plain Words' theory.

(iii) The May 23, 1980 Notice at A-55,-56, titled Appeal Procedures For Employees Terminated During Probation does not state, or indicate, statute 5 C.F.R. 315.806(c) at A-54. Since petitioner's termination fit into the situation for which that statute was created, he is entitled to appeal to the MSPB under 5 C.F.R. 315.806(c), which reads, as follows:

"(c) *On improper procedure.* A probationer whose termination is subject to section 315.805 may appeal on the ground that his termination was not effected in accordance with the

procedural requirements of the section." In turn, 5 C.F.R. 315.805 at A-53 is, as follows:

"When an agency proposes to terminate an employee serving a probationary or trial period for reasons based in whole or in part on conditions arising before his appointment, the employee is entitled to the following:

(c) *Notice of adverse decision.* The employee is entitled to be notified of the agency's decision .... The notice shall be in writing, inform the employee of the reason for the action, INFORM THE EMPLOYEE OF HIS RIGHT OF APPEAL TO THE MERIT SYSTEMS PROTECTION BOARD (MSPB), and inform him of the time limit within which the appeal must be submitted as provided in section 315.806(d)," which states the following:

"[5 C.F.R. 315.806(d) at A-54] An employee may appeal to the Board under this section a termination which the employee alleges was based on discrimination because of... religion."

This Notice at A-55 did not include or imply 5 CFR 315.805(c). Thereupon, the MSPB order at A-47,-48, based upon the presiding official's decision on Aug. 20, 1980 at A43-46, denying MSPB jurisdiction over petitioner's appeal of termination during probation based on religious discrimination is clearly erroneous, if not because only 2 of 3 board members decided it, referring to an amendment, found nowhere in the record, on decision sheet at A-48.

The MSPB may treat an FHB case as an adverse action, according to the 1978 U.S. Code & Ad. News, p. 2778 (at S-187 in the record), as follows:

> "(a)n employee may file a discrimination grievance with the agency on the basis of an action by the agency which is not itself appealable to the Board. Separately, the agency may propose to take an action against the employee of the kind appealable to the Board. Proceedings under both actions should be a part of the record considered by the Board .....Class actions, as well as individual complaints, involving discrimination issues are equally subject to the Board's jurisdiction."

Petitioner wrote the March 24, 1980 appeal letter at A59-76 concerning the FHB issue among other letters prior to termination, indicated at A-30,-31,-40, therefore, the FHB issue is reviewable as an adverse action, equivalent to his termination appeal.

Under 5 U.S.C. 8912, the district courts have jurisdiction to review the legality of excluding abortion coverage from the FHB, *AFGE v. Devine,* 525 F.Supp. 250 (D. D.C. 1981), with jurisdiction in the Claims Court, also, but if not, then, based on *Quinault,* also.

Therefore, the Claims Court has jurisdiction to review the December 12, 1980 MSPB order at A-47 and A-48, and the Aug. 20, 1980 decision, under 5 C.F.R. 1201.56(b) at A-57,-58 (S84), which states this:

> "(b) *Affirmative Defenses of the appealant.* Under 5 U.S.C. 7701(c)(2), the Board is required to overturn the action of the agency even where the agency has met the evidentiary standard set forth in subsection (a), above, in any case where the appellant:
>
> (1) Shows harmful error in the application of the agency's procedures in arriving at such decision;
>
> (2) Demonstrates that the decision was based on any

prohibited personnel practice in 5 USC 2302(b); OR

(3) Shows that the decision was not in accordance with law."

Under 5 U.S.C. 2302(b)(11), pursuant to 1201.56(b)(2), above, the Constitutionality of the FHB in question is appealable under MSPB jurisdiction, as explained in the Congression Record-House, Oct. 5, 1978, p. 33764, at S-58, as follows:

"(T)he conference substitute in section 2302(b)(11) adopts the Senate provision modified so that the law, rule, or regulation must 'directly concern' a merit system principle in order to be actionable as a prohibited personnel practice. This provision would make unlawful the violation of a law, rule, or regulation implementing or directly concerning the merit system categories of prohibited personnel practices. SUCH ACTIONS MAY LEAD TO APPROPRIATE DISCIPLINE. FOR EXAMPLE, SHOULD A SUPERVISOR TAKE ACTION AGAINST AN EMPLOYEE OR APPLICANT *WITHOUT* REGARD FOR THE INDIVIDUAL'S PRIVACY OR *CONSTITUTIONAL RIGHTS*, for such an action could result in dismissal, fine, reprimand, or other discipline for the supervisor."

Under "5 U.S.C. 1205 POWERS and functions of the MSPB and Special Counsel", "The MSPB shall— ... (e)(2) In reviewing any provision of any rule or *regulation* pursuant to this subsection, the Board shall declare such provision — (A) invalid on its face, if the Board determines that such provision would, if implemented by any agency, on its face, require any employee to violate section 2302(b) of this title;" (See A82-85).

The *regulation*, referred to in section 1205(e)(2), above, which is related to the FHB issue, here raised, is 5 C.F.R. 890.201(a)(2) which omits the category of "religion" from prohibited discrimination, thereby, seemingly, allowing the regulation to permit religious discrimination in FHB which, re-defined, is a violation of the petitioner's right to the free exercise of religion under the First Amendment.

Either under petitioner's C.O. argument in the *Thomas* analogy, and/or his bill of attainder argument, all raised as an affirmative defense, "a denial of enrollment ..under (petitioner's) plan" occurred because petitioner was only offered an unconstitutional FHB policy, denied a constitutional one. Thereby, the claims court admitted jurisdiction over petitioner's case concerning the FHB issue under 5 U.SC. 8912.

Now, petitioner can raise as an affirmative defense that the FHB included murder and constructive murder by abortion and contraception. In that *Roe v. Wade* 410 U.S. 113 (1973) held that it was not known whether life did not begin before an abortion begins, abortion and contraception must be held by this Court to be murder and constructive murder. Even though murder is a criminal matter, because the MSPB has jurisdiction even over a matter "which is not itself appealable to the Board" (S-187) and/or based on *Quinault*, the claims court has jurisdiction, especially noting no criminal trial is necessary after successfully raising the affirmative defense in question that typically is in criminal court.

Furthermore, having shown the violation of 5 U.S.C. 2302(b)(11) [under 5 U.S.C. 1205(e) (2)], "(T)he Board is required to overturn the action by the agency (termination

during probation) even where the agency has met the evidentiary standard set forth in subsection (a)," 5 CFR 1201.56(b). Therefore, it would seem irrelevant to prove Claims Court jurisdiction over petitioner's termination, overturned based solely on, successfully, raising the affirmative defense that abortion and contraception are unconstitutional; although claims court does. However, the termination could be decided another way, as follows:

"Once jurisdiction was obtained, the court could also consider the constitutional claims", *ROSANO v. U.S.*, supra, at 143 (A-10). Therefore, having obtained jurisdiction to decide the constitutionality of the FHB under entitlement to raise it as an affirmative defense, all other issues can be decided, likewise, such as whether ROSANO's termination, the denial of petitioner's Beneficial Suggestion Award (at A-49) was based on denial of his right to the free exercise of religion under the First amendment, illegalization of all affirmative action programs, forced busing to achieve racial balance, pornography, prostitution, euthanasia, homosexuality, so called "gay" rights, including the Constitutionality of school prayer, and the Constitutionality of the phrase "All men are created equal by God and endowed with certain inalienable rights, such as the right to life".

CONCLUSION

Petitioner requests back-pay, reinstatement, his Beneficial Suggestion award for all the savings to governmental appropriations as a result of his law suit, in the amount greater than otherwise, in view that petitioner took all the steps necessary himself, a rebate for the religiously offensive portion of coverage in question, and punishment to all supervisors and any and all public officials responsible for any of the unconstitutional conditions of employment that petitioner found himself in, arising from this controversy.

Because the federal question presented is of the utmost importance, and the United States Claims Court, with the CAFC affirming, has decided it in a way directly in conflict with the decisions of this Court, petitioner respectfully prays that a Writ of Certiorari issue to review the judgement and opinion of the United States Claims Court, affirmed by the CAFC.

Respectfully submitted by,

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DECISION OF U.S. CLAIMS COURT
9 Cl. Ct. 137 (1985)

Lawrence R. ROSANO, Plaintiff
v.
The UNITED STATES, Defendant.

No. 200-85C.

United States Claims Court.
Nov. 6, 1985

Lawrence R. Rosano, pro se plaintiff.

George M. Beasley, III, Washington, D.C., with whom was Acting Asst. Atty. Gen. Richard K. Willard, Washington, D.C., for defendant. David M. Cohen, Director, Washington, D.C., of counsel.

OPINION ON DEFENDANT'S MOTION FOR SUMMARY JUDGEMENT

PHILIP R. MILLER, Judge:

This is a suit brought by a terminated probationary civilian employee of the United States Navy for back pay, reinstatement, refund of part of his health insurance premiums paid during his employment, and an incentive award. The government has moved for summary judgment, arguing the court lacks jurisdiction to award judgment on such claims, and that, in any event, the back pay and reinstatement claims are barred as res judicata by prior decisions adverse to plaintiff.

I.

In November 1979, the Department of the Navy, Marine Corps, appointed plaintiff, a civilian, as a GS-11 engineer at Camp Pendleton. Plaintiff was a career conditional appointee, and was subject to a one-year probationary period. During his first days on the job, plaintiff was offered the opportunity, like all federal employees, to join the Federal Employees Health Benefits Program (FHP). The program lets federal employees choose a health insurance plan from among a group of plans preselected by the Office of Personnel Management (OPM). Under the FHP, the employee contributes a portion of the premium, and the government pays the remainder.

Plaintiff discovered that all the available plans included coverage for abortion and contraception. Opposed to these procedures on religious grounds, plaintiff requested a plan that did not provide such coverage. None being available, he asked either to have his premium prorated to exclude that portion which pays for the objectionable coverage or to have the government contribute its share to the premium cost of private insurance coverage. Plaintiff was informed that the FHP makes no provision for reduced premiums or contribution to insurance plans outside the FHP. He was told he could only choose a plan as provided or forgo coverage and the government contribution. Plaintiff complained that this choice—accept a plan that "funded" abortion or be denied health insurance—violated his first amendment rights. However, desiring health insurance benefits, he nevertheless enrolled in the Blue Cross-Blue Shield plan.

Plaintiff consulted with a Marine Corps Equal Employment Opportunity (EEO) counselor regarding his allegations

of religious discrimination. The EEO counselor informed plaintiff that he could pursue an EEO complaint or he could file a complaint on his own with the Merit Systems Protection Board (MSPB). He was advised to choose the MSPB route because the Navy EEO office at Camp Pendleton had no authority to change the FHP.

Plaintiff submitted his complaint to the Special Counsel of the MSPB, which informed him on April 7, 1980 that it was not authorized to pursue his complaint because there was no indication that any personnel practice or other activity prohibited by the Civil Service provisions had occurred.

After April 7, plaintiff concedes that he continually spent most of his official work time preparing a new complaint and responding to the Special Counsel's letter, and that his supervisors warned him that the time he was devoting to his complaint was excessive.

Plaintiff's petition reveals that despite these, and subsequent admonitions, after April 10 he continued to pursue his complaint substantially to the exclusion of his engineering duties. On May 20, his immediate supervisor recommended that he be terminated during his probationary period. The primary reason given was plaintiff's inability to complete research projects within reasonable time; numerous instances of plaintiff taking more than two to three times the time estimated to be necessary were noted. Additionally, his supervisor stated that plaintiff's engineering knowledge and experience were proving inadequate, and that plaintiff was unable to schedule his time or judge the degree of complexity required. On May 23, 1980 plaintiff was notified in writing that he was terminated effective May 30.

Plaintiff filed an informal EEO complaint with the Marine Corps EEO office at Camp Pendleton. After interviewing plaintiff, his supervisors and co-workers, the EEO counselor concluded that there was was no evidence of religious discrimination. A formal EEO investigation subsequently concluded that there was no discrimination and "[t]he complainant was removed solely because he was deficient in the performance of his assigned duties as a civil engineer."

Plaintiff also had appealed his termination and his constitutional complaint about the FHP to the MSPB. The MSPB held it was without jurisdiction to review the termination of a probationary employee for religious discrimination, and did not address the constitutional issue. Its order was upheld by the full Board on December 12, 1980. *Rosano v. Department of the Navy*, 4 M.S.P.B. 516, 4 M.S.P.R. 566 (1980).

Plaintiff appealed the Board's decision to the United States Court of Claims, which upheld the termination decision but remanded for the MSPB to consider his additional constitutional claim for award of a sum equal to the value of the government's contribution to his health insurance premiums during the period of his employment. *Rosano v. United States Marine Corps*, 229 Ct.Ct. 780 (1982) (*Rosano I*). On remand, the Board held it lacked jurisdiction to consider plaintiff's objections to the health plans selected under OPM's discretionary authority to contract with qualified carriers of group health insurance plans. *Rosano v. United States Marine Corps*, 10 M.S.P.B. 67, 11 M.S.P.R. 79 (1982). That decision was affirmed by the Court of Appeals for the Federal Circuit. *Rosano v. Department of the Navy*, 699 F.2d 1315 (Fed.Cir. 1983) (*Rosano II*).

Plaintiff then instituted suit in the United States District

Court for the Southern District of California, under 42 U.S.C. § 2000e-16, the provisions of the Civil Rights Act protecting government employees from employment discrimination. He contested his separation from federal employment and alleged religious discrimination and failure of the government to accommodate reasonably his religious beliefs. He sought back pay, reinstatement to his position, damages, costs and attorney's fees, and a finding that, as abortion is murder, his actions to prevent its "funding" were justified. The District Court granted the government's motion for summary judgment without opinion. *Rosano v. Secretary of the Navy*, Civ.N. 82-0987-JLI(H) (S.D.Calif. 1983). The United States Court of Appeals for the Ninth Circuit affirmed the judgment in an unpublished opinion, holding that plaintiff's termination as a probationary employee was not due to religious discrimination because Rosano conceded that he devoted his work time almost exclusively to his abortion concerns, that he spent more than the estimated time on his assigned projects, and that his superiors had warned him about his lack of output. The court stated that any inference that plaintiff had been terminated because of unlawful religious discrimination was negated by the absence of any material issue of fact concerning Rosano's lack of satisfactory job performance prior to the termination of his employment, and that an employer's obligation to make reasonable accommodations to an employee's religious beliefs does not include an obligation to pay him full salary when the employee spends the majority of his time on matters other than his work assignments. *Rosano v. Secretary of the Navy*, 735 F.2d 1372 (9th Cir.), *cert. denied*, —U.S.—, 105 S.Ct. 181, 83 L.Ed.2d 115 (1984) (*Rosano III*).

In his 185 page complaint, consisting of 702 paragraphs and 36 prayers for relief, plaintiff continues to seek back pay

and reinstatement (at a higher grade and new location). He further asks for a refund of that part of his insurance premiums that went to "fund" abortion, and for payment to him of an award he claims is his due for his suggestion that the United States Government would save millions of dollars by deleting abortion and contraception coverage from its employee health benefits program. He again asks for costs and attorney's fees, and damages (including free federal health insurance indefinitely). He also asks the court for declaratory relief on several points, including: that the First Amendment prohibits governmental funding of abortion in the group health insurance program for federal employees; that abortion is murder; that his termination violated the free exercise, free speech and establishment clauses of the First Amendment; that the government violated his right to follow the Code of Ethics; that contraception is constructive murder; that busing is unconstitutional; that abortion and contraception are religious practices which the government may not fund; that pornography is unconstitutional; that prostitution is unconstitutional; that school prayer is constitutional; that tax-exempt status for clinics providing abortion and contraception services is unconstitutional; that homosexuality is unconstitutional; that euthanasia is unconstitutional.

II.

[1] The Claims Court historically has no general jurisdiction to issue declaratory judgments. *United States v. King*, 395 U.S. 1, 89 S.Ct. 1501, 23 L.Ed.2d 52 (1969). Two express statutory exceptions, 28 U.S.C. § 1491(a)(3) (declaratory judgment authorized to afford complete relief on a contract claim) and 28 U.S.C. § 1507 (declaratory judgment authorized regarding Internal Revenue Code section 7428),

obviously do not apply. Therefore, plaintiff's only claims which are arguably within the Tucker Act are those wherein plaintiff seeks money; the back pay claim for wrongful termination, the premium refund claim, and the bonus award claim.

[2] For this court to have jurisdiction to render judgment in favor of plantiff upon any of his claims, such claim would have to assert that the federal government took money or property from him in contravention of the Constitution, a statute or a regulation, or, alternatively, the claim would have to be founded upon some provision of the Constitution, federal statues or regulations of an executive department that confers on a claimant, expressly or by fair interpretation, a substantive right to recover money from the United States. 28 U.S.C. § 1491; and *United States v. Mitchell,* 463 U.S. 206, 103, S.Ct. 2961, 77 L.Ed.2d 580 (1983); *United States v. Testan,* 424 U.S. 392, 96 S.Ct. 948, 47 L.Ed.2d 114 (1975); *Eastport Steamship Corp. v. United States,* 178 Ct.Cl. 599, 372 F.2d 1002 (1967).

A. *The Back Pay Claim for Wrongful Termination*

[3, 4] Plaintiff argues that his termination was improper because it was the product of religious discrimination. However, as already noted, that issue has already been decided adversely to plaintiff. In *Rosano I* the Court of Claims and in *Rosano III* the district court and the Court of Appeals for the Ninth Circuit decided that plaintiff had been terminated for cause and not because of religious discrimination. Plaintiff had full and fair opportunities to litigate this issue and is now barred by the law of collateral estoppel and res judicata from relitigating them anew merely because another forum is available. *Commissioner v. Sunnen,* 333 U.S. 591, 68 S.Ct.

715, 92 L.Ed. 898 (1948); *Blonder-Tongue v. University of Illinois Foundation*, 402 U.S. 313, 91 S.Ct. 1434, 28 L.Ed.2d 788 (1971). In his complaint plaintiff asks that *Rosano III* "be reexamined and overruled." But this court does not have jurisdiction to review the decisions of other courts. *City Development Co. v. United States*, 220 Ct.Cl. 730, 618 F.2d 122 (1979).

[5] Apart from the bars of collateral estoppel and res judicata, plaintiff's claim for improper termination of employment because of religious discrimination must be dismissed because jurisdiction of such a suit lies exclusively in a United States district court. Section 717 of the Civil Rights Act of 1964, as added by § 11 of the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-16(c) and 2000e-5(f)(3), and *Brown v. GSA*, 425 U.S. 820, 96 S.Ct. 1961, 48 L.Ed.2d 402 (1976). And see also *McGee v. United States*, 5 Cl.Ct. 480, 481 n. 1 (1984); *Fernandez v. United States*, 227 Ct.Cl. 601 (1981); and *Allison v. United States*, 211 Ct.Cl. 332, 546 F.2d 430 (1976).

[6] Finally plaintiff's claim to back pay must be dismissed, because, since the effective date of the Civil Service Reform Act of 1978, Pub.L. 95-454, 92 Stat. 1135 (5 U.S.C. § 7511 *et seq.*) (CSRA), this court has had no jurisdiction of claims for redress of adverse actions against probationary employees. *United States v. Connolly*, 716 F.2d 882, 886-88 (Fed.Cir. 1983), *cert denied* 465 U.S. 1065, 104 S.Ct. 1414, 79 L.Ed.2d 740 (1984). And *see also U.S. Dept. of Justice v. Federal Labor Rel. Auth.*, 709 F.2d 724, 728 (D.C.Cir.1983).

The Senate committee report on the Civil Service Reform Act states (S.Rep. No. 969, 95th Cong., 2d Sess. 45 (1978), *reprinted in* 1978 U.S. Code & Cong.Ad.News 2723, 2767):

> The probationary or trial period *** is an extension of the examining process to determine an employee's ability to perform the duties of the position. It is inappropriate to restrict an agency's authority to separate an employee who does not perform acceptably during this period.

The court in *Connolly* concluded therefore that (716 F.2d at 886):

> the legislative history of the Reform Act entirely forecloses the possibility that probationary employees have some sort of unspecified private right of action in the Claims Court under the Act to seek judicial review of their removals.
>
> *******
>
> Because Congress could have permitted probationers to challenge removals, but expressly declined to do so, we find it incongruous to suppose that appellee has an implied private right of action under the Civil Service Reform Act to seek judicial review of his dismissal.

[7] As for plaintiff's contention that the assertion of a claim of violation of the First Amendment to the Constitution confers the required substantive jurisdiction on this court, it suffices to say that violation of the First Amendment does not state a claim within the jurisdiction of the Claims Court, as "except for the taking clause of the fifth amendment the other amendments do not require the United States to pay money for their alleged violation." *Elkins v. United States*, 229 Ct.Cl. 607, 608 (1981), and see also cases cited therein. *Accord United States v. Connolly*, 716 F.2d at 887-88.

In support of his contention that the Claims Court has

jurisdiction of his claim, plaintiff cites *Kennedy v. United States*, 5 Cl.Ct. 792 (1984). *Kennedy* in turn relies on the decisions in *Jackson v. United States*, 192 Ct.Cl. 765, 428 F.2d 844 (1970) and *Swaaley v. United States*, 180 Ct.Cl. 1, 376 F.2d 857 (1967), wherein the Court of Claims entertained suits in which probationary employees claimed that they were dismissed in retaliation for their exercise of free speech. The Claims Court, in *Kennedy*, finding that *Connolly* had not overruled either *Jackson* or *Swaaley*, concluded that the Claims Court still has jurisdiction over constitutional claims where the probationers has no other available judicial recourse or review.

[8] This court declines to apply the rationale of *Kennedy* here, because plaintiff had available other judicial recourse, which in fact he utilized. *See Rosano III.* In addition, the Court of Claims has held that the unavailability of another judicial forum is irrelevant to the jurisdictional inquiry. *Featheringill v. United States*, 217 Ct.Cl. 24, 32 (1978).[1]

This court also believes that *Kennedy* is in conflict with the understanding of the Federal Circuit in *Connolly* as to the jurisdictional basis of *Jackson* and *Swaaley*. The circuit court expressly determined that jurisdiction in *Jackson* and *Swaaley* was based not at all on the fact that those claims were of constitutional dimension, but rather on the statutory entitlement to pay afforded by the basic pay statute. *Connolly*, 716 F.2d at 888. Once jurisdiction was obtained, the court could also consider the constitutional claims.

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[1]The United States Claims Court must accept the decisions of the United States Court of Claims as binding precedents unless and until modified by decisions of the United States Court of Appeals for the Federal Circuit or the United States Supreme Court. United States Claims Court General Order No. 1, October 7, 1982, 1 Cl.Ct. XXI; *South Corp. v. United States*, 690 F.2d 1368 (Fed.Cir.1982).

Jackson (1970) and *Swaaley* (1967) pre-date the effective date of the Civil Service Reform act of 1978, by which, the circuit court concluded, Congress effectively removed the pay statute as an independent ground for jurisdiction when it purposefully eliminated any review of probationary employee dismissals. *Id.* at 887. If the basic pay statute, on which the Court of Claims relied, still conferred jurisdiction, federal employees could maintain suit here without regard to the comprehensive system of review set out by Congress. That result would be plainly inconsistent with the decision in *Connolly*. For that reason, this court concludes that *Jackson* and *Swaaley* no longer support Claims Court jurisdiction; by the intervening statute, Congress has negated their current application.

B. *Refund of Insurance Premium.*

[9] Since plaintiff chose to pay his health insurance premiums voluntarily and the federal government acted only as a conduit for turning over the premiums to the carrier, the substantive jurisdiction of the court to award to plaintiff a money judgment against the government cannot be based upon the government having taken plaintiff's money in contravention of the Constitution, a statute or a regulation. Thus plaintiff must find some provision of the Constitution, or a statue or regulation which confers upon him a right to compensation or damages.

Plaintiff's claim that the inclusion of coverage of abortion risks in his health insurance premiums violates his First Amendment rights does not confer upon him a substantive right to compensation from the federal government, for, as previously noted, the First Amendment does not, expressly or impliedly, provide for payment of money damages and

cannot of itself provide plaintiff with a cause of action for money damages absent some other jurisdictional basis. *Elkins v. United States, supra;* and *United States v. Connolly, supra.*

[10] Nor is Mr. Rosano's claim founded on the Health Benefits Act, 5 U.S.C. §§ 8901-13, for it is not brought to enforce a specific right or obligation under that Act. No provision of such Act provides expressly for payment of compensation to a federal employee for unwanted coverage in health insurance premiums voluntarily paid, and it may not reasonably be concluded that it is implied. A decision illustrative of that principle is *National Treasury Emp. Union v. Campbell,* 589 F.2d 669 (D.C.Cir.1978). There the court held that in the Health Benefits Act Congress had consented to suit to review the conduct of the Civil Service Commission in failing to discharge its statutory duty to negotiate reasonable rates equitably reflecting the cost of the benefits provided. But with respect to a concurrent claim for money damages the court stated that "nothing in our jurisdiction or reviewability holdings in any way leads to or even supports the conclusion that damages either were actually contemplated by Congress or flow logically from the structure or content of the statutory scheme. *** That Congress has consented to suit, in short, does not mean that it has validated every conceivable cause of action and claim for relief which counsel can construct." *Id.* at 679.

Plaintiff contends that jurisdiction over this claim is conferred upon the Claims Court by 5 U.S.C. § 8912, which provides:

§ 8912. *Jurisdiction of courts*

The district courts of the United States have

> original jurisdiction, concurrent with the United States Claims Court, of a civil action or claim against the United States founded on [chapter 89—Health Insurance].

[11] However, while this section confers jurisdiction over the parties, it does not confer jurisdiction to award a money judgment on any claim which is not otherwise provided for by the Health Benefits Act. Section 8912 of Title 5 is identical to 5 U.S.C. § 8715, which pertains to Federal Employees Group Life Insurance. In *Walker v. United States*, 161 Ct.Cl. 792, 798-99 (1963), the court held that § 8715 does not add to the court's existing Tucker Act jurisdiction pursuant to 28 U.S.C. § 1491, but was enacted merely to enable making the United States a party to a court action in a district court, which would otherwise have been barred by the $10,000 limitation on suits against the United States in such court. 28 U.S.C. § 1346(b). Accordingly, the court held that Tucker Act claim for insurance benefits not expressly or impliedly provided for by the Life Insurance Act is beyond the court's jurisdiction despite § 8715. *Accord Robinson v. United States*, 8 Cl.Ct. 343 (1985). In *Robinson*, this court held that a plaintiff relying upon § 8715 must establish a "claim for which recovery of money damages is authorized by the Life Insurance Act." *Id.* at 345.

The Health Benefits Act (1959) followed the Life Insurance Act (1954) by about 5 years. The jurisdictional sections of the two Acts are identical, and the legislative history of the later Act is silent on the intention of Congress in adopting the identical language of the Life Insurance Act. *See* 1959 U.S.Code Cong. & Ad.News, 86th Cong., 1st Sess., p. 2913, *et seq.* Presumably, therefore, Congress had the same intent in using such language in 5 U.S.C. § 8912 as it did in enacting the

predecessor § 8715, *i.e.*, merely to expand the district court's jurisdiction under 28 U.S.C. § 1346(b) to allow making the United States a party defendant to a suit.

[12] Nor can any right to compensation under these circumstances be determined from the regulations governing the FHP. Section 890 of 5 C.F.R. deals with eligibility for enrollment and actions "reviewing a claim denied by a plan." There is no "fair interpretation" that an employee can sue for money, absent a denial of enrollment or benefits under a plan, merely because he objects to the plans in the program.

C. *Suggestion Award.*

Plaintiff seeks an amount equal to what the government would have saved had it adopted his suggestion that abortion and contraception coverage be deleted from the FHP.

The governing statute provides that the head of any agency "may pay a cash award to *** an employee who (1) by his suggestion *** contributes to the efficiency, economy or other improvement of Government operations *** ." 5 U.S.C. § 4503. The determination whether or not to make an award rests with the head of the agency, as does the amount to be paid. *Id.* § 4502.

[13] The decision is thereby wholly discretionary for suggestions accepted, and lacks the "money mandating" provision required for Tucker Act jurisdiction. *See Adair v. United States*, 227 Ct.Cl. 345, 648 F.2d 1318 (1981) (court lacks jurisdiction over claim grounded on incentive pay statute that is discretionary in nature). *Accord Uraga v. United States*, 4 Cl.Ct. 106 (1983).

[14] Because plaintiff's suggestion was not accepted, there is also no basis on which to claim an award was due on the theory of an implied contract. *Griffin v. United States*, 215 Ct.Cl. 710 (1978), in which the Court of Claims exercised jurisdiction over an incentive award on a theory of implied-in-fact contract because the Air Force had accepted and implemented the suggestion *and* made an award (although in a lesser sum than that sought), is inapposite here. No contract can be implied where the government rejected the suggestion. *See McGee v. United States*, 5 Cl.Ct., at 482 (1984).

Conclusion

For the foregoing reasons, defendant's motion for summary judgment is allowed. The clerk is directed to dismiss the complaint, with costs to be allowed to defendant.

U.S. REPLY TO OPPOSITION TO SUMMARY JUDGMENT, U.S. Claims Court, September 23, 1985

IN THE UNITED STATES CLAIMS COURT

LAWRENCE R. ROSANO,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

No. 200-85

DEFENDANT'S REPLY TO PLAINTIFF'S OPPOSITION DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Inasmuch as we have already addressed the issues fully in our opening brief and plaintiff has in no way rebutted our arguments in his opposition brief ("P. Op. Br. ") we will not belabor the issues.

I. This Court Lacks Subject Matter Jurisdiction

Plaintiff's contentions (P. Op. Br. 2-12) that this Court has subject matter jurisdiction are, to the extent they are comprehensible at all, devoid of legal merit. Plaintiff has not alleged any facts which, if proved, might make out a case that his removal during his probationary period was in retaliation for his exercise of his First Amendment rights. It is clear that he

was discharged because he was devoting substantially all of his on-duty time to challenging the Government health insurance system, rather than performing his assigned duties. See pages 41-42 of the appendix to our opening brief. Thus, even assuming arguendo that a probationary employee may bring a Tucker Act suit in this Court based upon a claim that his constitutional right to free speech was violated, he has not alleged any facts tending to prove such violation.

II. This Court Lacks Jurisdiction To Grant Plaintiff A Beneficial Suggestion Award

As in his response to our jurisdictional argument, plaintiff errs in assuming that we have admitted the factual allegations in his prolix complaint. We only assume their truth for the purpose of this motion. It is clear, however, that under no view of the facts would this Court have jurisdiction to grant a monetary award for a beneficial suggestion made by a Government employee, at least where, as here, there was no acceptance of the suggestion and there is no showing of any savings to the Government in any event. Accordingly, the Court should reject plaintiff's contentions (P. Op. Br. 12-16) on this issue.

III. This Court Lacks Jurisdiction Over Plaintiff's Claim That The MSPB Had Jurisdiction To Consider His Appeal

At pages 16-31 of his brief, plaintiff makes a confusing argument, apparently contending that the Merit Systems Protection Board (MSPB) erred in holding that it lacked jurisdiction to hear his religious discrimination claim. This Court, however, lacks jurisdiction to review MSPB decisions pursuant to the Civil Service Reform Act of 1978. The United

States Court of Appeals for the Federal Circuit has already upheld the MSPB decision on Mr. Rosano's claim, so there is no point in transferring the case to that court.

IV. Plaintiff Has Not Rebutted Our Arguments Based On Res Judicata

To the extent that plaintiff seeks to avoid the *res judicata* effect of the cases upon which we rely, his arguments, to the extent they can be understood, are devoid of merit. Accordingly, we rely upon our moving brief.

CONCLUSION

Nothing plaintiff has offered in his opposition brief detracts in any way from the soundness of the arguments made in our brief in support of our motion for summary judgment. For the foregoing reasons, as well as the reasons stated in our opening brief, the Court should grant defendant's motion for judgment and dismiss the complaint.

Respectfully submitted,

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Attorneys for Defendant
SEPTEMBER 23, 1985

DECISION OF U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT

UNITED STATES COURT OF APPEALS

United States Court of Appeals for the Federal Circuit

LAWRENCE R. ROSANO,

Appellant,

v.

THE UNITED STATES,

Appellee.

Appeal No. 86-837

DECIDED: September 16, 1986

Before FRIEDMAN, *Circuit Judge,* COWEN, *Senior Circuit Judge,* and NIES, *Circuit Judge.*

PER CURIAM.

The judgment of the United States Claims Court, granting the motion for summary judgment of the United States and dismissing the complaint, is affirmed on the basis of the opinion of that court, 9 Cl.Ct. 137 (1985).

AFFIRMED

ROSANO v. SECRETARY OF THE NAVY
Decision of the Court of Appeals, 9th Cir. (1984)
(ROSANO III)

Filed May 3, 1984
Phillip B. Winberry,
Clerk, U.S. Court of Appeals

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LAWRENCE R. ROSANO,

Plaintiff-Appellant,

v.

SECRETARY OF THE NAVY,

Defendant-Appellee.

MEMORANDUM*
No. 83-6384
D.C. #CV-82-0987-JLI

Appeal from the United States District Court
for the Southern District of California
J. Lawrence Irving, District Judge, Presiding
Argued and submitted April 4, 1984

Before: WALLACE, SCHROEDER, and NELSON,
Circuit Judges.

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*The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21 of the Rules of this Court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, forgoing publication in the *Federal Reporter*, and that this memorandum may not be cited to or by the courts of this circuit save as provided in Rule 21(c).

Lawrence Rosano appeals the district court's grant of summary judgment in favor of the Secretary of the Navy and against his claim that his termination as a probationary employee was due to religious discrimination. *See* 42 U.S.C. § 2000e-16 (Supp. V 1981). To establish a prima facie case of discrimination a plaintiff must show that: (1) he was a member of a legally protected group; (2) he was subjected to adverse treatment; (3) his job performance was satisfactory; and (4) he was terminated under circumstances that give rise to an inference of unlawful discrimination. *Douglas v. Anderson,* 656 F.2d 528, 531 (9th Cir. 1981); *see also Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981). Rosano concedes that after April 7, 1980, he devoted his work time almost exclusively to his abortion concerns. He also does not deny that he spent more than the estimated time on his assigned projects and that his superiors warned him about his lack of output. Therefore, no issue of material fact exists concerning Rosano's lack of satisfactory job performance prior to termination.

Even if Rosano had established a prima facie case, however, an employer's obligation is to make reasonable accommodations for an employee's religious beliefs. *Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63, 74-75 (1977). No case has held that reasonable accommodation means that the employer must pay the employee full salary when the employee spends the majority of his time on matters other than his work assignments. *See Trans World Airlines, Inc. v. Hardison,* 432 U.S. at 84 (requiring an employer to bear more than a de minimis cost to accommodate an employee's religious beliefs is an undue hardship). Under these circumstances, summary judgment in favor of the Secretary was proper.

Affirmed.

NAVAL EEO INVESTIGATIVE REPORT

REPORT OF INVESTIGATION
EQUAL EMPLOYMENT OPPORTUNITY
COMPLAINT OF
Lawrence R. Rosano

May 8, 1981

I. DESCRIPTION OF COMPLAINT:

A. Title and grade of complainant's position:
Civil Engineer, GS-11

B. Name and location of agency and unit involved in complaint:
Public Works Department
Marine Corps Base Camp Pendleton, CA

C. Nature of action, decision or condition giving rise to complaint:
Termination during probationary employment

D. Date of alleged discrimination:
May 30, 1980

E. Date of formal complaint:
July 8, 1980

F. Kind of discrimination alleged:
Religion (Catholic)

G. Identity of alleged discrimination official:
Mr. Theodore O. Thomas, Complainant's immedi-Supervisor
Mr. David C. Edwards, Supervisory General Engineer
CDR Richard E. Andrews, Public Works Officer

II. DESCRIPTION OF INVESTIGATION:

A. Identity of investigator:
Richard V. Brady, Personnel Management Specialist, Western Field Division, Naval Civilian Personnel Command, 880 Front Street, Suite 5-s-29, San Diego, California 92188

B. Date case received by investigator:
9 February 1981

C. Date report of investigation submitted to Equal Employment Opportunity Officer:
7 May 1981

D. Place(s) of investigation
Del Mar, California, Winners Circle Lodge
Marine Corps Base Camp Pendleton, CA

E. Dates of investigation:
25 February 1981 — 30 March 1981

III. ISSUE(S) OF COMPLAINT:

That the complainant alleges that he was terminated because of his religious beliefs (Roman Catholic) rather than for the reasons of performance deficiency and lack of professional engineering knowledge cited in the notification of his termination.

IV. DESCRIPTION OF EXHIBITS:

1. Formal complaint dated July 8, 1980 with attachments including Notification of Termination dated May 1980

2. EEO Counselor's Report dated July 3, 1980

3. Notice of Final Interview with EEO Counselor dated 23 June 1980

4. Letter from Commanding General to Complainant BKS/PAM/erw 12773 (undated) Notice of Receipt of Discrimination Complaint.

5. Letter from Chief of Staff to Complainant BK5/erw 12713 dated January 30, 1981 acccpting issue of termination based on religious discrimination.

6. Letter from Commanding General to Director, Western Field Division, Naval Civilian Personnel Command BK5/WEM/erw 12713 dated Jan 30, 1981 requesting EEO Investigator.

7. Affidavit of Lawrence R. Rosano, formerly Civil Engineer, GS-11 (complainant-Religion (Roman Catholic).

8. Letter from EEO Investigator, Western Field Division, Naval Civilian Personnel Command, to Mr. Louis J. Abruzzo, Esq. Complainant's Representative dated 2 March 1981

9. Affidavit of Mr. David C. Edwards, Supervisory General Engineer, GS-13, (ADO-Non Catholic)

10. Affidavit of Richard E. Andrews, CDR. U.S.N. (cec) Public Works Officer (ADO—Non Catholic)

11. Affidavit of Russ Hatfield, Supervisory Labor Management Relations Specialist, GS-12 (Witness—Non Catholic)

12. Letter of interrogatory from EEO Investigator to Mr. Theodore O. Thomas, P.O. Box 388, USAEDFE, APO, San Francisco, CA 96301, complainant's immediate supervisor; (formerly)

13. Extract P.L. 95-454 October 13, 1978 (Civil Service Reform Act) section 2302 Prohibited Personnel Practices

14. 29 CFR Part 1605-EEOC Guidelines on Discrimination because of Religion

15. CPI 713B-04 pp 13, 14

16. Affidavit of Theodore Olen Thomas, Civil Engineer, GS-12, (ADO)

17. Letter of Interrogatory to CDR Richard E. Andrews, Public Works Officer, MCB Camp Pendleton from EEO Investigator dated 22 April 1981

18. Supplemental affidavit of David C. Edwards, Supervisory General Engineer GS-801-13

V. CHRONOLOGY

Dates:	**Events:**
5 November 1979	Complainant appointed on Career Conditional appointment as Civil Engineer, GS-11, Public Works, Marine Corps Base, Camp Pendleton
week of 12 November 1979	Complainant notified by Ms. Ann E. Allen, Civilian Personnel Office, MCB Camp Pendleton that he must elect a health benefits plan or sign a waiver of coverage
13 November 1979	Complainant under protest elects a FEHBP medical insurance because of the abortion coverage included in every FEHBP according to advice he alleged he received from Ms. A.E. Allen.

7 January 1980	Complainant alleges that he requested counseling concerning religious discrimination against him as a Roman-Catholic caused by the abortion services coverage in all medical insurance plans offered under the FEHBP. Complainant alleges that Mr. Garza and Mr. W.E. Marbrey, DEEOO advised him that his complaint was not subject to resolution at the MCB Camp Pendelton level that he should file a complaint with the Special Counsel to the Merit Systems Protection Board (MSPB).
1980 (March 24, April 10, May 9, 13, June 3)	Complainant wrote to MSPB detailing his complaint against FEHBP insurance plans.
16 May 1980	Date set by Mr. Edwards for Complainant's completion of Solar Cell Support project, Job Order 00-908-80.
22 May 1980	Complainant issued Notification of Termination effective May 30, 1980
6 June 1980	Appealed Termination to MSPB
8 July 1980	Filed formal EEO Discrimination Complaint against MCB Camp Pendleton

8 July 1980	Formal complaint forwarded to MSPB at their request and subsequently dismissed by MSPB presiding official for lack of jurisdiction
12 December 1980	MSPB decision concerning lack of jurisdiction upheld by full MSPB
30 January 1981	MCP Camp Pendleton accepted issue of termination for investigation.
9 February 1981	EEO Investigator assigned
25 February- 30 March 1981	On site investigation

VI. **BACKGROUND:**

The complainant alleges that the week following his appointment he was called to the Civilian Personnel Office to elect a health insurance plan or to waive coverage. After reviewing all plans Blue Cross, Blue Shield, Aetna, Kaiser Permanente, and Employee Organization sponsor plans the Complainant was informed that all plans provide abortion coverage. (Exhibit—1 at Tab A)

The complainant argues that the FEHBP pamphlet contains information concerning the employee's rights and benefits to which he is entitled. The pamphlet states that the Program offers a choice of plans so that the employee can get the *kind* and *amount* of protection best suited to his needs. (Exhibit-1 at TABB)

He argues that the kind and amount of abortion coverage he needs and wants is zero based upon his religious (Roman Catholic) teaching and beliefs (Exhibit-1 at TABC). Accordingly, he feels that the FEHBP discriminates against him on the basis of his religion in not offering a benefit to which he is entitled without violating his conscience based on the highest religious principles regarding abortion i.e., the Catholic Church holds and teaches that abortion is murder and a violation of the Ten Commandments, a belief he holds with the "strength of traditional religious views" consistent with 29 CFR Part 1605.1 (Ex-14)

In electing a health benefits plan a portion of the employee's premium contribution as well as a portion of the Federal Government's contribution goes toward financing abortion coverage provided under the plan chosen. (Exhibit-1 at TABB).

In order to completely disassociate himself from paying any portion of the abortion services provided, the Roman Catholic employee has no choice but to waive his right to health benefits, an important fringe benefit of his employment, since all plans offered include abortion coverage.

The Complainant argues that the Government's failure to provide a plan either without abortion coverage or with abortion coverage on an optional rider basis, constitutes a prohibited personnel practice as defined under 5USC 2302 (a) (2) (A) (IX) involving "a decision concerning pay, benefits ...with respect to an employee in, ... a covered position in an agency." (Exhibit-1TABG and Exhibit-13).

Citing the code of Ethnics for Government Service (Exhibit-1TABD) the Complainant argued that any person in

Government Service should have unlimited time on-the-clock to fight this form of discrimination (Exhibit-1TABE) in accordance with the principles of the Code (Exhibit-1 TABD):

(a) "Put loyalty to the highest moral principles and to country before loyalty to persons, party or Government department."

(b) "Uphold the Constitution, laws, and legal regulations of the United States and all governments therein and never be a party to their evasion."

Accordingly, the Complainant perceived it to be his duty to seek a redress of the Government's infringement on the free exercise of his religion, a 1st Amendment violation. While on Government time he wrote letters to the Office of Special Counsel, Merit Systems Protection Board for a redress of the Grievance caused by FEHBP's discrimination favoring abortion.

The Complainant states that abortion-on-demand represents a practice of utilitarianism, a philosophical doctrine that considers utility as the criterion of action and the useful as good or worthwhile. A form of religion proposed by Jeremy Bentham and John Stuart Mill holds that all moral, social or political action should be directed toward achieving the greatest good for the greatest number of people. A practice which discriminates against other religions which are opposed to abortion.

The Complainant argues that the FEHBP violated the First Amendment which specifies: "Congress shall make no law respecting an establishment of religion or the free practice

thereof." His authority for using Government time were the rules and standards of conduct regarding the specific moral choices to be made by a person in Government Service according to the Code of Ethics (Exhibit 1-TABD). In pursuing this course of action he allegedly became deficient in the performance of his engineering duties failing to complete his assignments on a timely basis and was notified of his termination effective 30 May 1980 (Exhibit-1TABF).

The issue accepted for investigation (Exhibit-5 at paragraph 3 is whether his termination was based on religious discrimination or incompetence as charged in the notice of termination (Exhibit-1TABF).

VII. ANALYSIS AND FINDINGS:

A. **Allegation:** That the Complainant's termination was based on religious discrimination (Roman Catholic) rather than on deficiencies in performance and the lack of professional engineering knowledge as charged in the Notification of Termination (Exhibit-1TABF).

1. **Information in support of the Complainant's position:**

a. The Complainant in his affidavit (Exhibit-7)

— alleged that because of the stand he took against the religious discrimination of the Federal Employees Health Benefits Program (FEHBP) i.e. that all Government Health Benefits Plans provide abortion services coverage the cost of which is distributed on a prorata basis among the total number of employees insured by a given plan when the premium rate for that plan is derived.

— the Complainant argued that his only option was to waive all health benefits coverage if he wished to completely disassociate himself as a premium contributor toward the abortion services provided; and if he did waive coverage that he would be denied a valuable fringe benefit of his employment;

— accordingly, the Complainant alleged that this First and Fourteenth Amendment rights under the Constitution were being violated.

i.e. the health benefits program is covered by law and the First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;" the Fourteenth Amendment provides that "No state shall...deny to any person within its jurisdiction the equal protection of the law."

—alleged that the Government's failure to offer a plan without abortion services thereby denying him a valauable fringe benefit of his employment was a violation of PL 95-454, Civil Service Reform Act of 1978, in that it was a prohibited personnel practice i.e. "a decision concerning pay or benefits with respect to an employee in...a covered position in an agency; 5USC2302 (a) (2) (A) (IX)

—citing the Code of Ethics for Government Service (Exhibit-1TABD) the Complainant seeking a redress of grievances undertook a concerted effort by writing letters to the Office of Special Counsel, Merit Systems Protection Board, to Congressmen etc. during his normal duty hours. He argues that the Code specifies that any person in Government Service should:

"Put loyalty to the highest moral principles and to country above loyalty to persons, party, or Government department" and "Uphold the Constitution, laws and legal regulations of the United States and all governments therein and never be a party to their evasion." And "Expose corruption wherever discovered."

—cited meetings with Mr. Marbrey, DEEOO, MCB Camp Pendleton and Mr. Garza, EEO Specialist during which he alleges that they told him that "any time I needed to devote to my discrimination complaint would be on government time and that my boss could not charge this time off to annual leave, or use this against me during my probationary period."

During a meeting on January 3, 1980 with Mr. Garza and Mr. Marbrey the Complainant alleges that they advised him that he could have a full investigation of his complaint at MCB Camp Pendleton using Government time to prepare and present his case. The Complainant alleges that during the same meeting they also advised him that the complaint and remedy he was seeking was interagency in impact and was beyond the jurisdiction of the Commanding General. He alleges that they advised him to write down all his complaints and send them to the Office of Special Counsel, Merit Systems Protection Board.

The Complainant alleges that when he elected to file a complaint with the Special Counsel they told him that he was on his own and could not use government time to write letters to the Special Counsel (Exhibit-ITABH).

—FPM Supplement 990-I Book III Part 713, regarding official time permissible to prepare and present a complaint,

provides "If the Complainant is an employee of the agency he shall have a reasonable amount of official time to present his complaint if he is otherwise in an active duty status."

—the Complainant's interpretation of this authority in conjunction with the principles of the Code of Ethnics cited above was that he could work up to 8 hours per day on official time in pursuit of his complaint *if reasonable for the kind of work necessary to oppose abortion* (Exhibit-1TABE) and to petition the Government based on the Code of Ethnics for Government Service, to uphold the Constitution and regulations...

-the Complainant also cited a Supreme Court decision on 30 June 1980 which upheld the Hyde Amendment prohibiting public funds to be used for abortion. (Exhibit-1 Tab I).

b. In rebuttal to the charges of performance deficiency made in the notice of termination (Exhibit-1TABF) the Complainant alleged (Exhibit-7) that the estimated man days to complete a job is just that, an estimate. It *always takes more time to complete a job than the amount of time estimated.*

-the Complainant also rebutted the time overrun on the parking lot, job order 00-903-79 (Exhibit-1TABF paragraph 2C). His affidavit (Exhibit-7 page 4) alleges that after he completed the plans and preliminary cost estimate CDR Andrews decided that he wanted to locate the lot on the east side vice the west side of the roadway as he had planned. The change in location caused the delay which was attributed to his poor performance.

—the Complainant attributed time in execess of estimated time on other job orders assigned to him to various reasons

including administrative details in the Civilian Personnel Office, illness caused by headache and stomach pains and untimely responses by contractors when specifications were requested.

2. **Information in rebuttal to the Complainant's position:**

a. Mr. David C. Edwards, the Complainant's second level supervisor, in his affidavit (Exhibit-9) testified:

-that the Complainant's religion had *absolutely nothing to do with his decision to terminate* the Complainant that he had taken the action because of the Complainant's failure to produce.

-that he (Edwards) learned of the Complainant's performance deficiencies through reports from the Complainant's first level supervisor Mr. T.O. Thomas and from his own first hand knowledge of the Complainant's failure to complete projects in a timely manner, in accordance with prevailing conditions.

-that he could not recall the Complainant's having completed a single assignment in a timely manner contrary to the Complainant's assertion that he had completed his first assignment in less than the allotted time.

— that Mr. Rosano had spent several days with Mr. Marbrey DEEOO pursuing his discrimination complaint concerning FEHBP coverage of abortion services. Mr. Edwards alleges that the Complainant's time with Mr. Marbrey was to the total exclusion of his engineering assignments.

-Mr. Edwards stated that he *called Mr. Marbrey to ask him to expedite his business with the Complainant* to reach a conclusion so that the Complainant could return to his engineering work as quickly as possible.

-Mr. Edwards stated that he would not have objected to the Complainant's use of a reasonable amount of official time. He stated that *he would not have posed an objection had the Complainant not used anymore than 24 hours of official time.*

-29 CFR 1613-214 (b) provides that an employee of an agency shall have a reasonable amount of time to present his complaint. CPI 713B-4 (b) quantifies reasonable amount, provides authorization for Complainants to use official time when meeting with the EEO Counselor, EEO Investigator, EEOO for informal adjustment and while participating in a hearing. In addition it provides official time for preparation of the formal complaint (one or two hours); preparation of documents for the investigator; preparation for informal adjustment-meeting after receipt of the investigative file (four to eight hours but less than four hours if the matter is straight forward and the file is brief); preparation of reply to proposed disposition (one hour); preparation for a hearing (four to eight hours unless the matter is straight forward then less than four hours); review by Sec Nav (EARB) without a hearing (one to four hours preparation) additional time maybe provided as a matter of policy for preparation of appeals to the Office of Appeals and Review (OAR), EEOC.

-it is therefore contemplated that except for meeting with the EEO Counselor, EEO Investigator, EEOO and during hearings, official time allowed for all phases of the administrative complaint process will be in the amount of approximately 24 hours (Exhibit-15).

-Mr. Edwards stated that the estimated time for completion of a job is determined by use of a *37% time delay factor* to cover administrative distractions, command interest projects which preempt the engineer's time, and other miscellaneous duties and functions which may distract from actual time spent on an assignment. Therefore, he concluded that the Complainant's excuse for the time overrun caused by sickness, administrative details etc. was not valid because it would have been compensated for by the 37% factor.

-Mr. Rosano's account (Exhibit-7) of the time spent on the parking lot assignment, job order 00-903-79, is essentially correct.

-that the solar cell support plans, job order 00-908-80 was an extremely simple job that he had allowed the Complainant two weeks to complete (Mr. Edwards estimated that he could have personally taken over the project 00-908-80 and completed it in 3 or 4 hours) (Exhibit-9 at page 4).

-Mr. Edwards alleged that on 2 May 1980 he asked the Complainant if he could complete job order 00-908-80 in two weeks and he replied, "yes." He (Edwards) asked if he would and he replied, "Yes." Mr. Edwards said that on Friday, 16 May 1980, the date set for completion the Complainant had not completed the project and *it did not appear to him (Edwards) as though the Complainant had done any work on the project since their 2 May meeting even though he had been present for duty most of that time.*

-on the following Monday (19 May 1980) he requested that the Civilian Personnel Office prepare a letter for the Complainant's termination.

-that the professional knowledge deficiencies cited in the notice of termination were inputs from the Complainant's immediate supervisor, Mr. T.O. Thomas.

-that the Complainant asked basic questions which any civil engineer should know, was given basic references to look up the answers and he would at some later time as the same questions.

-that as a summary statement he (Edwards) took action to terminate the Complainant because he was not producing as an Engineer and was taking two or three times longer to complete projects than was estimated (within the 37% factor built in to accommodate delays).

-that he (Edwards) is personally opposed to abortion.

c. Richard E. Andrews, Commander USN (CEC), Public Works Officer, in his affidavit (Exhibit-10) provided the following testimony:

-alleged that he did not consider the Complainant's religion when making his concurring decision to have the Complainant terminated.

-that as Public Works Officer he was 3 or 4 levels above the Complainant in the chain of command.

-that he sat in on one or more discussions with Mr. Dave Edwards and Mr. Ted Thomas during which the Complainant's performance deficiencies were discussed i.e., failure to complete projects within a reasonable time frame.

-that in reviewing the job order file for job order 00-903-79 main gate parking lot plans (attachment to Exhibit-10) that it appears that Mr. Thomas completed the cost estimate, plans and sketch for the east side location. Therefore he (Andrews) believed that all of the Complainant's elapsed time on the project was charged to his development of the plans for the west side location.

-that he decided to locate the lot on the east side of the roadway through the main gate because it was a location which was more functional for traffic flow when persons were arriving on base.

-that the cost estimates were relatively the same, the east side being slightly smaller but cheaper than the west side location.

-that his decision to deny the farewell coffee to the Complainant was based on the circumstances of the Complainant's termination.

-that farewell coffees are occasions reserved for persons who are retiring or transferring after having given valued service and are occasions which engender words of praise for the departing employee.

-that the Complainant's situation made a farewell coffee entirely inappropriate and his religion had nothing to do with his (Andrews) decision to deny it.

c. Russ Hatfield, Supervisory Labor Management Relations Specialist, in his affidavit (Exhibit-11):

-stated that within the context of his discussion with the Complainant concerning whether he could pursue his discrimination complaint on official time, told him that he could not do so for 8 hours per day to the exclusion of his civil engineering duties and responsibilities.

-stated "That is not what you (Complainant) were hired for."

3. **FINDING of Fact**

a. Testimony from supervisors, Mr. D. Edwards and CDR R.E. Andrews, Public Works Officer assert that the Complainant was deficient in his performance i.e. failing to complete projects on schedule taking 2 or 3 times longer than estimates.

b. That estimates include a 37% factor for unanticipated delays such as Command interest projects, administrative functions, illness etc.

c. That the Complainant spent several days on official time discussing and presenting his complaint to Mr. Marbrey and Mr. Garza, MCB Camp Pendleton DEEOO during the December 1979/January 1980 time period.

d. That the entire official time allotted for the complaint process including hearing and appeals to EEOO is approximately 24 hours excluding time spent with the EEO Counselor, EEO Investigator, EEOO and during participation in complaint adjustment and hearing.

e. That Mr. Edwards would not have objected had the Complainant spent as much as 24 hours of official time on his complaint but that his letter writing activities consumed much more than that to the exclusion of his engineering duties.

-that Mr. Edwards could not recall a single project assignment completed on time according to the estimate and that the Complainant repeatedly asked basic questions known to all civic engineers thus demonstrating a lack of professional knowledge.

-that both Mr. Edwards and CDR Andrews denied any consideration of the Complainant's religion in their initiation and concurring decisions (respectively) concerning the Complainant's termination.

-that the Complainant believed the Code of Ethnics for Government Service (Exhibit-ITABD) in containing provisions that the employee: put loyalty to the highest moral principles above loyalty to persons in Government department; the upholding of the Constitution, laws and legal regulations; and the Exposure of corruption wherever discovered, gave him authority to spend up to 8 hours per day of official time fighting the religious discrimination he perceived through the FEHBP inclusion of abortion services coverage in all health plans offered. As a Roman Catholic the Complainant believed that the FEHBP abortion coverage in all plans *either denied him the free exercise of his religious beliefs against abortion or denied him a valued fringe benefit of his employment if he was forced to waive FEHBP on religious objections.*

-the Complainant alleged that his supervisors terminated him not because of performance deficiencies but because they discriminated against his religion (Roman Catholic).

-the Complainant alleged that the estimates were just estimates i.e. gross judgements and that it always took more time to do a job than the amount of time estimated;

-alleged administrative distractions, tardy contractor responses, illness and fatigue caused part of the delays in his project completion. In one instance of plans for a parking lot J.O. 00-903-79 the Complainant alleged the delay in completion was because of a change in location by CDR Andrews.

-CDR Andrews admitted that he changed the location of the parking lot from the site planned by the Complainant but stated that Mr. T.O. Thomas prepared the plans for the alternate site.

-Mr. T.O. Thomas' affidavit (Exhibit 16): confirms that he prepared the parking lot plans and cost estimate for the west side location (attachment to Exhibit 10).

-provides specific examples related to job order/project number (paragraph g, 1-5 exhibit-16) wherein the Complainant was deficient in professional engineering knowledge.

-alleged that his decision to recommend the Complainant's termination was based on his unsatisfactory performance and poor grasp of engineering fundamentals rather than any consideration of the Complainant's religion or religious beliefs as alleged in the complaint (see Exhibits-12 and 16 for Mr. Thomas' complete statement).

In response to Exhibit 17, Mr. David C. Edwards, Civil Branch Engineer testified that no records of project job order assignments by job order number were kept by Public Works management on Mr. Rosano's co-workers to show their elapsed time on a project in retaliation to the estimated man days for completion.

The complainant's assertion in his affidavit (Exhibit 7) that the estimated man days cited in the notice of termination as not having been met by the complainant (Exhibit 1) were just estimates not really intended to be met was not successfully rebutted by management's response (Exhibits 17 and 18).

RICHARD V. BRADY
EEO Investigator

DECISION OF PRESIDING OFFICIAL TO THE MSPB
Dated August 20, 1980

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
SAN FRANCISCO FIELD OFFICE

LAWRENCE R. ROSANO
v.
U.S. MARINE CORPS

DECISION NO: SF315H8010134
DATE: August 20, 1980

I. INTRODUCTION

The appellant, Lawrence R. Rosano, filed a petition on June 6, 1980, appealing the decision of the U.S. Marine Corps, Camp Pendleton, San Diego, California, the agency, that removed him from his position of Civil Engineer, effective May 30, 1980.

II. JURISDICTION

The removal action in this case was initiated by the agency after January 10, 1979. This appeal is therefore governed by the provisions of the Civil Service Reform Act of 1978. (Pub. L. No. 95-454, 92 Stat. 1111, effective January 11, 1979.)

The appellant began his employment with the agency on November 5, 1979, subject to completion of a one year probationary period commencing that date. He was, therefore, serving this probationary period when he was removed May 30, 1980.

The statutory rights of appeal for an employee who has been removed from Federal employment are set forth at 5 U.S.C. 7511-7514. Excluded from coverage are employees serving a probationary period under an initial appointment. 5 U.S.C. 7511(a) (1) (A).

Since appellant was removed during his probationary period, 5 U.S.C. 7511(a) (1) (A) excludes coverage of his appeal to the Board. However, appeal rights to the Board also exist for actions in which jurisdiction has been properly granted by regulation of the Office of Personnel Management (OPM). 5 U.S.C. 1205(a) (1), 5 C.F.R. Part 315H. The employee whose employment is terminated for post-appointment reasons is provided the right to appeal under 5 C.F.R. 315.806, where he alleges that his termination was based on partisan political reasons or marital status.

A review of the record discloses that the agency terminated appellant's employment because of his alleged deficiencies in the performance of his duties. Appellant's removal was, therefore, based on post-appointment reasons.

In his submissions to the Board, appellant contends that he was discriminated against by the agency because of his religion, Catholic, and because he was not allowed to work on his discrimination complaint during duty hours. The substance of appellant's complaint of religious discrimination is that because of his religion, he is opposed to abortion, and the Government Employee Group Health Insurance to which he is forced to contribute provides coverage for abortions.

Appellant's contentions do not raise either the issue of partisan political reasons or the issue of marital status as discrimination. Additionally, appellant's claimed right to work

on his religious discrimination complaint during duty hours is not a matter appelable to the Board under 5 C.F.R. 315.806(b). Accordingly, I find that appellant's appeal of his termination during probation is not within the jurisdiction of the Board. 5 C.F.R. 1201.3(a) (8), 5 C.F.R. 315.806(a).

DECISION

Appellant's appeal is dismissed because the Board lacks jurisdiction in this case.

This decision is an initial decision and will become a final decision of the Merit Systems Protection Board on September 24, 1980 unless a petition for review is filed with the board within 35 calendar days of issuance of this decision.

Any party to this appeal, the Director of the Office of Personnel Management and the Special Counsel may file a petition for review of this initial decision with the Merit Systems Protection Board, 1717 H. Street, N.W., Washington, D.C. 20419.

The Board may grant a petition for review when a party submits written arguments and supporting documentation which tends to show that:

(1) New and material evidence is available that despite due diligence was not available when the record was closed; or

(2) The decision of the Presiding Official is based upon an erroneous interpretation of statute or regulation.

The Director of OPM may file a request for review only if he/she is of the opinion that the decision is erroneous and will have substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office. 5 U.S.C. 7701(e)(2).

Under 5 U.S.C. 7703(b) (1), the appellant may petition the United States Court of Appeals for the appropriate circuit or the United States Court of Claims to review any final decision of the Board, provided the petition is filed no more than thirty (30) calendar days after receipt.

FOR THE BOARD:

FRANCIS LEE
PRESIDING OFFICIAL

ORDER OF THE MERIT SYSTEMS PROTECTION BOARD DATED DECEMBER 12, 1980

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

LAWRENCE R. ROSANO
v.

MSPB Docket No.
SF315H8010134

DEPARTMENT OF THE NAVY
U.S. MARINE CORPS

ORDER

The Board, having fully considered appellant's petition for review of the initial decision issued on August 20, 1980, and finding that it does not meet the criteria for review set forth at 5 C.F.R. 1201.115, hereby DENIES the petition.*

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. 1201.115(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

December 12, 1980

Robert E. Taylor
Secretary

Washington, D.C.

DECISION SHEET TO MSPB ORDER,
December 12, 1980

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DECISION SHEET

IN THE MATTER OF:

Lawrence R. Rosano v. Navy (USMC) Probationary Termination
Docket No. SF315H801034

Staff Recommendation:
Petition for review denied.

REFERRED TO:
☐ Special Counsel ☐ OCC ☐ Special Decisions ☐ OA

Date For the Board

TO BOARD: 11/28/80 DECISION DUE: 12/18/80

BOARD ACTION:

	Agree	Disagree	Modify	Date	Income Under Secretary's Signature Yes	Income Under Secretary's Signature No	Newsworthy Yes	Newsworthy No
Ruth T. Prokop, Chairwoman								
Ersa H. Poston, Vice Chair	See Inst. as modified			12 10 80		√		√
	√ as modified			12 10 80	√			
Ronald P. Wertheim, Member								

SECRETARY ACTION:

Issued by the Secretary pursuant to 20 day policy.

Date Secretary

Date Returned to the Office of the Secretary: 12/12/80
Date Serviced by the Office of the Secretary: 12/12/80

DENIAL OF BENEFICIAL SUGGESTION AWARD

The fact that Mr. Lawrence R. Rosano is opposed to abortion because of his religious convictions does not warrant a major change in the administration of the Federal Employees' Health Benefits Programs (FEHBP) as he suggests. The FEHBP is designed to provide health care needs to the majority of civilian employees, and does not take into consideration personal or religious beliefs such as Mr. Rosano's. Therefore, it is recommended that this suggestion not be adopted.

Tom Hillyard, OP-141D1,
Evaluator
12/June 1980

Earl T. Payne, OP-141D,
Reviewer
12/June 1980

BENEFICIAL SUGGESTION
MARCH 24, 1980

DEPARTMENT OF THE NAVY

Rosano, Lawrence R., Civil Engineer, GS-11, 093-38-1270. Marine Corps Base, Camp Pendleton, Cal., Public Works Office, (714) 725-6111,—6261.

SUGGESTION
Saving Government MONEY — over $100 million per year!

With reference to my enclosed *COMPLAINT (COMPLAINT:* refer to March 24, 1980 letter to MSPB)

(1) From *Point 1* and *Point 2* — reducing my share of health insurance premium *will necessarily reduce* the Government's outlay of Premium Benefit appropriations* based on the same reduction percentage. This reduction, extended through the vast numbers of Federal Employees Premium Benefits Program participants having similar religious, and/or conscientious, views as my own, will be substantial enough to justify the full and in-depth investigation and subsequent determination thereof.

(2) From *Points 3, 4, 5 and 6*—the amount of savings the United States Government will incur is the accrued sum of U.S. Government appropriation* reductions resulting from the implementation of their corresponding REMEDIES contained in the enclosed *COMPLAINT.*

(*) The definition of the word, "appropriation", should hereafter be construed to apply not only to appropriations, but to any other sums of money, such as financial grants, costs,

expenses, salaries, or any other monies which are derived, and/or collected, from any and all Federal, State, or local tax revenues:

(a) that relate to the expedition of these appropriations, such as that by Government employees, and/or

(b) that relate to the objectionable UTILITARIAN practices condoned and supported by the Government of the United States, some of which are stated in my enclosed *COMPLAINT*.

OPM'S ESTIMATED REDUCTION BASED ON BENEFICIAL SUGGESTION

February 22, 1982

UNITED STATES OFFICE OF
PERSONNEL MANAGEMENT
Washington, D.C. 20415

Feb. 22, 1982

Honorable Raymond J. McGrath
House of Representatives
Washington, D.C. 20515

Dear Mr. McGrath:

This is in reference to your inquiry in behalf of Mr. Lawrence R. Rosano of Elmont, New York concerning the appropriations relating to the Federal Employees Health Benefit Program (FEHBP). *The additional information requested in Mr. Rosano's letter was sent under separate cover.*

We have enclosed a copy of the financial schedule for the FEHBP as presented in the President's FY 1983 Budget. This information should adequately address these questions concerning both the 1981 and 1982 appropriations for the Fund.

We estimate that by eliminating the abortion coverage in the Health Insurance Program we will achieve a .2% reduction in program costs for 1982.

Sincerely yours,

Jean M. Barber
Assistant Director
Office of Financial Control
and Management

Enclosure

TITLE 5 C.F.R. § 315.805 and § 315.806

§ 315.805 Termination of probationers for conditions arising before appointment.

When an agency proposes to terminate an employee serving a probationary or trial period for reasons based in whole or in part on conditions arising before his appointment, the employee is entitled to the following:

(a) *Notice of proposed adverse action.* The employee is entitled to an advance written notice stating the reasons, specifically and in detail, for the proposed action.

(b) *Employee's answer.* The employee is entitled to a reasonable time for filing a written answer to the notice of proposed adverse action and for furnishing affidavits in support of his answer. If the employee answers, the agency shall consider the answer in reaching its decision.

(c) *Notice of adverse decision.* The employee is entitled to be notified of the agency's decision at the earliest practicable date. The agency shall deliver the decision to the employee at or before the time the action will be made effective. The notice shall be in writing, inform the employee of the reasons for the action, inform the employee of his right of apeal to the Merit Systems Protection Board (MSPB), and inform him of the time limit within which the appeal must be submitted as provided in § 315.806(d).

§ 315.806 Appeal rights to the Merit Systems Protection Board

(a) *Right of appeal.* An employee may appeal to the Merit Systems Protection Board in writing an agency's decision to terminate him under § 315.804 or § 315.805 only as provided in paragraphs (b) and (c) of this section. The Merit Systems Protection Board review is confined to the issues stated in paragraphs (b) and (c) of this section.

(b) *On discrimination.* An employee may appeal under this paragraph a termination not required by statute which he or she alleges was based on partisan political reasons or marital status.

(c) *On improper procedure.* A probationer whose termination is subject to § 315.805 may appeal on the ground that his termination was not effected in accordance with the procedural requirements of that section.

(d) An employee may appeal to the Board under this section a termination which the employee alleges was based on discrimination because of race, color, religion, sex, or national origin; or age, provided that at the time of the alleged discriminatory action the employee was at least 40 years of age; or physical handicap, only if such discrimination is raised in addition to one of the issues stated in paragraph (b) or (c) of this section.

(5 U.S.C. 7701, et seq.)
[33 FR 12418, Sept. 4, 1968, as amended at 40 FR 15380, Apr. 7, 1975; 44 FR 48951, Aug. 21, 1979]

APPEAL PROCEDURES FOR EMPLOYEES TERMINATED DURING PROBATION

1. You may appeal your termination any time after receipt of the letter of decision, but not later than 15 days after the effective date of the action. You may appeal directly to the Merit Systems Protection Board at the following address:

Merit Systems Protection Board
San Francisco Region
525 Market Street
San Francisco, CA 94105

2. Such an appeal must be in writing and may be made on the basis that:

a. The procedure prescribed under Civil Service regulations or the administrative requirements of the Navy were not followed.

b. The adverse action was taken for partisan political reasons, except as may be required by law, or resulted from discrimination because of marital status or physical handicap.

3. If you believe the reason for this action was based on discrimination because of race, color, religion, sex, age, or national origin, you may file a complaint of discrimination on that basis within 15 calendar days after receipt of this notice. The complaint, if filed, must be in writing and may be filed in person or by mail with the Commanding General, Marine Corps Base, Camp Pendleton, who is the Equal Employment Opportunity Officer, or any of the following officials authorized to receive discrimination complaints:

Deputy EEO Officer
Human Affairs Section
Assistant Chief of Staff, Manpower
Room 246, Bldg. 1160
Marine Corps Base
Camp Pendleton, CA 92055

Federal Womens Program Coordinator
Manpower Control and Utilization Office
Assistant Chief of Staff, Manpower
Room 240, Bldg. 1160
Marine Corps Base
Camp Pendleton, CA 92055

(Complaints may be filed with the Secretary of the Navy, the Navy's Director of Equal Employment Opportunity, or the Navy's Federal Womens Program Coordinator, all located at the Navy Department, Washington, D.C. 20390. However, it is urged that you file directly with the Equal Employment Opportunity Officer, Marine Corps Base, Camp Pendleton, since your complaint will be referred to him for processing, regardless to whom submitted.)

5 C.F.R. 1201.56 Burden and degree of proof, affirmative defenses

(a) Burden and degree of proof. (1) Agency: Under 5 U.S.C. 7701(c)(1) the agency action must be sustained by the board if:

(i) It is brought under 5 U.S.C. 4303 and is supported by substantial evidence; or

(ii) It is brought under any other provision of law or regulation and is supported by a preponderance of the evidence.

(2) *Appellant:* The appellant shall have the burden of proof as to issues of jurisdiction and timeliness of filing.

(b) *Affirmative defenses of the Appellant.* Under 5 U.S.C. 7701(c)(2), the Board is required to overturn the action by the agency even where the agency has met the evidentiary standard set forth in subsection (a), above, in any case where the appellant:

(1) Shows harmful error in the application of the agency's procedures in arriving at such decision;

(2) Demonstrates that the decision was based on any prohibited personnel practice described in 5 U.S.C. 2302(b); or

(3) Shows that the decision was not in accordance with law.

(c)(1) *Substantial evidence.* That degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as adequate to support the conclusion that the matter asserted is true.

(2) *Preponderance of the evidence.* That degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

(3) *Harmful error.* Error by the agency in the application of its procedures which, in the absence or cure of the error, might have caused the agency to reach a conclusion different than the one reached. The burden is upon the appellant to show that based on the record as a whole the error was harmful, i.e., caused substantial harm or prejudice to his/her rights.

(d) *Moving forward.* In cases where action has been taken against an employee by the agency, the agency shall present its case first. The appellant may then present evidence.

MSPB APPEAL OF MARCH 24, 1980 (or Mar. 11, 1980)

TO: MERIT SYSTEMS PROTECTION BOARD
OF THE FEDERAL CIVIL SERVICE
OF THE UNITED STATES GOVERNMENT

RE: COMPLAINT OF DISCRIMINATION ON
RELIGIOUS AND/OR CONSCIENTIOUS
GROUNDS

COMPLAINANT: LAWRENCE R. ROSANO
Civil Engineer, GS-810-11
Department of the Navy
Public Works Office, Bldg. 1160,
Rm. 280
Marine Corps Base
Camp Pendleton, CA 92055
(714) 725-6111 or (714) 725-6261

Home Address: 2325 Paseo de Laura,
Apt. 220
Oceanside, CA 92054
(714) 433-9782

AND ALL OTHERS SIMILARLY SITUATED AS
TO THE MATTERS OF THE DISCRIMINATION
COMPLAINT HEREIN SPECIFIED.

DISCRIMINATION PARTIES:

UNITED STATES GOVERNMENT OFFICE OF
PERSONNEL MANAGEMENT AND FEDERAL
EMPLOYEES HEALTH BENEFITS
PROGRAM CONTRACTORS:

I Government
Wide Plans:

1. Service Benefit Plan (Blue Cross-Blue Shield)
   Administered by the Blue Cross and Blue Shield
   Federal Employee Program.

2. Indemnity Benefit Plan (Aetna)
   Administered by the Aetna Life Insurance Co.

II Employee
Organization
Plans:

1. Government Employees Hospital Association
   Benefit Plan,

. and others.

III Comprehensive
Plans:

1. Comprehensive Medical Plans Network
   (Blue Cross and Blue Shield).

2. Kaiser Foundation Health Plan
   and others.

AND ALL OTHER PARTIES INCLUDING UNITED STATES GOVERNMENT OFFICES, DEPARTMENTS, AGENCIES, EMPLOYEES, AND CONTRACTORS INVOLVED IN THE DISCRIMINATORY ACTIONS WHICH ARE THE SUBJECT OF THIS COMPLAINT.

2325 Paseo de Laura
Apt. 220
Oceanside, CA 92054
March 24, 1980

MERIT SYSTEMS PROTECTION BOARD
1717 H STREET, N.W.
WASHINGTON, D.C. 20419

Dear Sirs:

On Monday, November 5, 1979, I began work as a GS-11, Civil Engineer, at the U.S. Marine Corps Base, Camp Pendleton, California.

During the week following, I was told by Mrs. Ann E. Allen, of the Civilian Personnel Office on base, that if I did not sign up with a government group health insurance plan soon, I would lose the *Premium Benefit* which the Federal government was offering me during that short period after I began work as a new employee.

This health Premium Benefit means that, in my case, the government would pay a little more than half the cost of my total premium to Blue Cross/Blue Shield. I chose this insurance company, even though it covered abortion, which my religion opposes, because (1) it appeared to have more coverage than others; (2) Mrs. Allen stated to me that "they (Health Insurance Companies) all cover abortion...it's legal"; and (3) having health insurance was essential for me.

Days before I signed up on November 13, 1979, I discussed this dilemma with my supervisor, Mr. Ted Thomas, who brought me down to the Civilian Personnel Office, where Mrs. Allen showed me every type of government health insurance policy available.

It was apparent that all the government health plans covered abortions. Therefore, I asked Mrs. Allen a question: If I found a health insurance company that did not fund abortions, and had comparable coverage, would the government likewise pay a similar percentage of the premium on my behalf? Mrs. Allen replied that the government would not.

I then stated to Mrs. Allen that, if I should take the government group health insurance which covers abortion, which I am opposed to contribute towards, I would then be forced against my will to pay for abortions.* Mrs. Allen replied that I would not be forced to accept *any* health plan, because I had the option to refuse the federal employees benefits health insurance plan and get insurance on my own which would not cover abortions, and thereby not receive any amount of benefits contribution from the government. In other words, I would not then be receiving any government health premium benefits, benefits that are available to other employees. If I refuse to pay for abortions through my health insurance premiums, the government would likewise refuse to pay any premium benefit contribution that otherwise I would have enjoyed, had I accepted the mandatory abortion commitment.

In essence, the government will refuse to pay this premium benefit unless I accept paying for abortion through my share of my health insurance premium. This is in spite of, and in total disregard of, my religion, which is opposed to my participation, cooperation, or contribution to abortions in any manner, including through my share of my health insurance premiums.

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*The word "abortion" should hereafter be construed to apply not only to abortion, but to all abortion-related services in the context of this complaint (itemized definition enclosed, marked Addendum I).

POINT 1

Therefore, *conclusively*, using the only two options that are available to me:

1. If I refuse the government employees health program because of the *mandatory* abortion coverage which my religion opposes, the U.S. Government is very clearly discriminating against me by refusing me this premium benefit that other employees enjoy, *solely* because I am opposed to abortion which my religion forbids. This clearly violates my Fourteenth Amendment rights.

2. On the other hand, if I accept the government employees health insurance program, the U.S. Government is *coercing* me to contribute to abortion, which my religion forbids, and this is a direct attack on the First Amendment, which insures each individual Freedom of Religion, which this country claims to honor.

In an attempt to solve this dilemma, I had several conversations and conferences with Mr. Marbrey, Equal Employment Opportunity Officer at Camp Pendleton, and his assistant, Mr. Garza. They investigated the channels available to me to pursue this matter, and on Monday, January 7, 1980, Mr. Garza notified me verbally that my complaint should be prepared, in writing, and sent to: Special Counsel of the Merit Systems Protection Board (MSPB), 1717 H Street, N.W., Washington, D.C. 20419, with a copy to the Office of Personnel Management, 1900 E Street, N.W., Washington, D.C. 20415. I am therefore sending my complaint herewith in compliance with accepted procedure, and with faith in the statement in the *Federal Employees New Digest, Inc.*, Vol. 29, Issue 22 (29/22) which reads: "The Merit

Systems Protection Board is setting up a consumers affairs program whereby the general public as well as federal employees can submit complaints regarding government personnel actions and *policies* ...The MSPB in turn will relay these complaints to the respective federal departments and agencies, *which will be required to report back as to what steps are taken to remedy the situation.*"

POINT 2

Because these health insurance companies, as businesses, are creatures of government, they are subject to the First and Fourteenth Amendments, and have violated these Amendments in the following ways:

1. By forcing me to pay that portion of my health insurance premium that goes to pay for abortion, Blue Cross/Blue Shield is preventing me, in a free enterprise marketplace, from freely practicing my religion, which is opposed to my participation, cooperation, or contribution to abortion in any way whatsoever, with its policy design refusing me my right to choose coverage. Blue cross/Blue Shield has created a "monopoly on coverage" which directly wars against my religion, opposed to abortion, by not *reducing* their health insurance premium by that amount which goes to pay for abortion.

   Blue Cross/Blue Shield must accommodate my religious views so that no portion of my premium payments are associated with abortion, either by participation, by contribution, and/or by cooperation of any sort, even in the most remote way.

2. In addition, Blue Cross/Blue Shield is discriminating against me through their mandatory abortion coverage, by refusing me the right to choose my coverage, which is based on:

   a. my religion being against any participation, cooperation, or contribution to abortion in any way whatsoever; and

   b. the statement in the Federal Employees Health Benefits Program pamphlet, under title "What the Program Offers You" (copy enclosed, marked Exhibit A), which says:

      "A choice of plans so that you can get the *kind* and *amount* of protection best suited to your needs."

      The *amount* of abortion coverage (*kind* of coverage) I need and want is *zero*. Realize, please, that I *was never given* this choice, in spite of the statement in this same Federal Employees Health Benefits Program pamphlet under title "TO EMPLOYEES:" (copy enclosed, marked Exhibit B), which says: "...This pamphlet contains important information about your rights...the benefits to which you are entitled".

The Civil Service Commission (or contracting agency) and Blue Cross/Blue Shield neglected to consider *my* needs, one of which is the need to disassociate myself entirely from paying that portion of my health insurance premium which goes to pay for abortion. The same applies to other health insurance companies under the Federal Employees Health Program, who, together with Blue Cross/Blue Shield, are left

free and unrestrained by government to have this pro-abortion biased *monopoly on coverage* built into the design of each of their policies. In the context of b, above, this "need" can be based on other reasons than religion, such as conscience, so that item b, above, is both *necessary and sufficient* to clearly and conclusively prove paragraph 2 of POINT 2.

In conclusion, the solution to this religious and/or conscientious discrimination by Blue Cross/Blue Shield is through a change in the design of their policies to *reduce* my health insurance premium by that amount which goes to pay for abortion. This implies that I must be able to enjoy the same premium cost/rates of the other items covered which are not against my religion and/or conscience, because not doing so would violate the Fourteenth Amendment prohibiting cost-discrimination against me based on religion and/or conscience. Therefore, my just insurance premium must be my present premium reduced by that portion of it which goes to pay for abortion.

POINT 3

This involves the violation of the First Amendment which prohibits the Federal Government from practicing a doctrine which robs citizens of the right to freely support the religion of their choice, not that which is predetermined by the government in any coercive way.

Since the government's share of health insurance premiums (the premium benefit), made for each of the vast numbers of participating Federal government employees, retirees, and others in this huge system, is paid for through my federal taxes, my money, through Federal taxes, is being used to participate, co-operate, and contribute to abortion through that

portion of this premium benefit payment which is used for abortion by each of the government group health insurance plans. I am, therefore, effectively contributing to abortion through my tax money for the entire Federal Civil Service health program—not just on this premium benefit which supplements my own premium payment.

The United States Government, therefore, has violated the First Amendment on two fronts:

1. Since my religion is opposed to abortion, the Federal Government is refusing me the right to practice my religion, which religion is opposed to my participation, co-operation, or contribution to abortion in any way whatsoever; and

2. The U.S. Government is violating the First Amendment because it is practicing a doctrine which not only interferes with religion (violating the First, and foremost Amendment), but, in fact, actually wars against the First Amendment itself by practicing a religion-interfering doctrine.

In present day context, abortion is the termination of an "unwanted pregnancy", or a "not meaningful life". These terms are values given to unborn human life, ultimately by the mother.

Abortion is a fruit of utilitarianism, which is a doctrine that the value or worth of human life is determined solely upon its utility or usefulness, or "wantedness." Since abortion is committed because the value of the life in the womb is determined to be "not wanted" or "not useful" to the mother, abortion therefore is utilitarianistic.

As by the fruits you will know the tree, so abortions are the fruits of the tree which is utilitarianism. Because the government protects, promotes, and supports abortion, the U.S. government is supporting utilitarianism.

However, many citizens hold religious and/or conscientious beliefs that God created human life, and because God created it, this life must be good and meaningful, and therefore very valuable.

A mother practicing the doctrine of utilitarianism when she values her unborn child's life as "unwanted", "not meaningful", or "not viable", all of which mean "not useful to the mother" herself. The government is practicing the doctrine of utilitarianism by supporting this mother's decision for abortion over what many religions believe, that lives in the womb are created by their Creator, and endowed with certain inalienable rights, such as the right to life (Declaration of Independence, 1776).

Consequently, the United States is supporting the doctrine of utilitarianism, and is violating the First, and foremost, Amendment—freedom of religion—which prohibits the government from using itself as an instrument of any one religion or doctrine which would interfere with the freedom of any other religion or doctrine.

Therefore, in order that the United States government practice what the First Amendment demands of itself, all support of abortion by the Federal government must stop immediately, lest the government remain in violation of the First Amendment.

This governmental disassociation of supporting doctrines which would interfere with freedom of religion has been scrupulously observed, until recent times.

For instance, during President John F. Kennedy's campaign, many asked if he would use government as an instrument of Catholic doctrine, to which he replied that he would not.

The government must keep itself in a position of neutrality as far as religion is concerned by reason of the First Amendment. The First Amendment, therefore, explicitly prohibits the government from supporting utilitarianism by paying for the utilitarianistic decisions of the mother involved, over what other religions believe: that life is created by God, who never could create life with no definite purpose because He created human life in His image and likeness. In addition, the Commandment given by Moses—"Thou shalt not murder"—is a religious law for many religions.

POINT 4

This point involves Federal and State governments' support of abortion through HEW, Medicare, Medi-Cal, and all other such agencies and departments which contribute to abortion through tax monies, which represents government support of utilitarianism, as explained in Point 3, paragraphs 1 and 2.

POINT 5

This point involves taxation rights, which the Supreme Court has taken from the American People.

American history proves that the Supreme Court never was given this power to decide matters of taxation.

I recall the Boston Tea Party from my history book in elementary school. I remember the phrase: "Taxation without representation is tyranny."

The precedent was set then...that taxation matters are decided by the American people through their elected representatives or by direct vote.

The Supreme Court is not elected, but appointed. Taxation must be authorized by either a direct vote (as occurs sometimes at the local level), or through elected representatives, but never through appointed Supreme Court justices; even "elected" judges form the Judicial Branch of government only. Law interpretation is one thing, but for the Supreme Court to decide what, and how much, the American People should pay for, is taxation without representation.

POINT 6

This point involves the Supreme Court's violation of the First Amendment in its decision which legalized abortion on January 22, 1973.

In this decision, the Court wrote that life in the womb is "not meaningful life," which is utilitarianistic by its very definition, as cited in Point 3, Part 2.

Clearly then, the Supreme Court used its Bench as an instrument of utilitarianism which, again, is the doctrine that the value or worth of human life is determined *solely* by its utility or meaningfulness.

The First Amendment prohibits government from using itself as an instrument of one particular religion or doctrine which interferes with any other religion or doctrine.

In summary, supporting a mother who believes in utilitarianism , the government is actually supporting the doctrine of utilitarianism, which violates the First Amendment. Clearly, this is exactly what the Court does when it uses utilitarianism by saying that life in the womb is "not meaningful," and on this basis the Court has acted improperly and illegally.

THEREFORE, in view of all the above, I hereby request:

1. that the government provide health insurance policies with the equivalent coverage as to what is now provided, but without abortion and/or abortion related services; and that the premiums of these policies be *reduced* by that just portion which goes to pay for abortion and abortion related services;

   or

   that the government *remove* all abortion and/or abortion related services from coverage from all health insurance policies, except that such coverage may be offered to each individual insured as an additional optional rider for which an additional premium or charge is paid, computed in an actuarially sound and just manner;

   and

2. that such policies be made readily available to all Federal employees, retirees, and all other applicable participants;

3. that a full and in-depth investigation be made into the Government's violation:

(a) referred to in *Point 3*, which remedy calls for the reduction of this *Premium Benefit* which supplements the health insurance premium share of *all* Federal Civil Servant Health Program participants;

(b) referred to in *Point 4*, which remedy calls for the reduction of Government appropriations for HEW, Medicare, Medical, and all other such Agencies and Departments;

4. that a full and in-depth investigation be made into the Supreme Court's violation:

(a) referred to in *Point 5*, which remedy calls for appropriate action to be taken to check further taxation abuse that the Supreme Court has perpetrated, and for all the Supreme Court decisions regarding taxzation be stricken as *NULL AND VOID*; such as, Federal and/or State support of abortion funding, busing, etc....;

(b) referred to in *Point 6*, which remedy calls for the immediate removal of each Supreme Court Justice found guilty of violating his oath to uphold the Constitution of the United States—FOR NO MAN IS ABOVE THE LAW—and for their ABORTION-ON-DEMAND decision of January 22, 1973 be stricken as *NULL AND VOID*.

Respectfully,

LAWRENCE R. ROSANO,
Civil Engineer

Attachment: Exhibit A & B, Addendum I
Certified — Return Receipt Requested

cc: Office of Personnel Management
1900 E Street, N.W.
Washington, D.C. 20415

Mr. Marbrey & Mr. Garza (Asst.)
Equal Opportunity Officer
Marine Corps Base, Building 2444
Camp Pendleton, California 92055

DEFINITION OF ABORTION

DEFINITION:

"ABORTION" is meant to include not only abortion, but all items which are related to abortion in the context of this complaint, in that they are associated with, or are related to, the practice of utilitarianism which my religion and conscience forbid, which include the following:

(1) any and all types of abortions for any reason, including D&C, D&E, vacuum aspiration, saline, prostaglandins, *hysterotomy and cesarian section* done "with abortion in mind",

(2) any and all artificial means of contraception, not natural, including IUD, birth control pills, or any and all abortifacients; sterilization.

(3) fertility procedures where many embryoes, at any stage of their development, may possibly be destroyed in the process of creating one or more *"wanted"* ones,

(4) amniocentesis, fetal experimentation, x-rays, any and all types of drugs, fertility control, referral services, ambulatory coverage, local anestesia, diagnostic techniques, services incurred by attendants, nurses, and/or doctors, and room and board,—ALL of which are provided, and/or done, "with abortion in mind",

(5) preabortion and postabortion family counseling done "with abortion in mind",

(6) sex transformations,

(7) all administration costs, including that for processing, administrating, advertising, and advertisements—such as radio, T.V., brochures, applicant's forms, membership cards, etc...which refer to, or are associated with, ALL of the above items of coverage, even in the most remote way, and,

(8) this definition *will not* include a procedure, or service, performed after an abortion has begun, which purpose is to save the mother from possible death, such as from hemorrhaging to death, since the expressed intent, here, is to *SAVE LIFE*, not end it!—of both mother and child, equally.

ADDENDUM I

EXHIBIT "A"

Federal Employee Health Benefit Handbook

WHAT THE PROGRAM OFFERS YOU

- A chance to enroll in a group health benefits plan with less expensive premiums and better protection than you can get as an individual.
- A *choice of plans* so that you can get the *kind* and *amount* of protection best suited to your needs.
- Guaranteed protection which cannot be canceled by the plan.
- Coverage without medical examination or restrictions because of age or physical condition.
- Coverage without waiting periods after the effective date of enrollment (see page 10).
- "Catastrophic" coverage to help you pay the expenses of serious illness or accident.
- A Government contribution toward the cost of your plan.
- Easier payments through regular payroll deductions.
- Continued protection for up to 365 days without cost to you while you are in a nonpay status on account of illness or other reason (except military duty of more than 30 days of reduction-in-force furlough).
- Temporary protection for 31 days without cost to you, after your enrollment or coverage of a family member ends (except if you voluntarily cancel) to give you or your family member time to convert to an individual contract.
- Continued protection after retirement (if you meet the length-of-service and other requirements) with the same benefits as for active employees.
- Continued protection for your survivor annuitants after your death with the same benefits as for active employees.

EXHIBIT "B"

Federal Employee Health Benefit Handbook

TO EMPLOYEES:

One of the advantages of working for the Federal Government is the protection against the expenses of accident and illness which you can have through the Federal Employees Health Benefits Program. *This pamphlet contains important information about your rights* and obligations under the Program.

You should also have a brochure of the plan in which you are enrolled which sets forth the benefits (including the exclusions and limitations) of your plan. Also, the pamphlet "Information to Consider in Choosing a Health Plan" (BRI 41-210), contains important information to assist you in choosing a health plan suitable to your needs. Keep these booklets together in a convenient place and refer to them when you have questions about the Program or *the benefits to which you are entitled.*

DECISION OF THE OFFICE OF SPECIAL COUNSEL TO THE MERIT SYSTEMS PROTECTION BOARD

1717 H St., N.W.
Washington, D.C. 20419

Date: Apr 3, 1980

To: Mr. Lawrence R. Rosano
2325 Paseo de Laura #220
Oceanside, CA 92054

In Re: 000535

This concerns your communication dated March 11, 1980 referred to us by: _____

This Office is authorized to receive and investigate allegations of certain activities prohibited by civil service law, rule, or regulation (primarily the prohibited personnel practices set forth in 5 U.S.C. 2302) and may recommend (but not order) corrective action when it is determined that a *prohibited personnel practice* has been or is being committed. This Office, however, is not authorized to deal with or seek redress for employee complaints or grievances which may be resolved more appropriately under established complaint, grievance, or appeals procedures unless it involves a *prohibited personnel practice* specified in 5 U.S.C. 2302. [5 U.S.C. 1206(a)(1) and (e)]

This Office is also authorized to receive and transmit to the agency concerned information that evidences a violation of any law, rule, or regulation, or mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety by or within the cognizance of a Federal agency. This Office, however, is not authorized to investigate these types of allegations. [5, U.S.C. 1206(b)]

We have reviewed the information you have provided and marked below our disposition, action or need for further information from you.

☐ 1. We will make further inquiry into the matters raised and inform you of the results and of any further action by this Office.

☐ 2. We have referred the information provided to the agency concerned pursuant to 5 U.S.C. 1206(b)(2) and will inform you of the agency's report of the action taken or to be taken.

☐ 3. We have referred the information provided to the agency concerned for an investigation and report pursuant to 5 U.S.C. 1206(b)(3). We will send you a copy of the report when received.

☐ 4. We cannot act on the information provided without your consent to disclose your identity to the agency involved. If you wish us to pursue this matter, please complete and sign the enclosed form in the appropriate places and return it to this Office.

☐ 5. Your communication does not provide enough information (of the type we need) for us to determine what action we can take. If you wish us to pursue this matter, please complete the enclosed form and return it to this Office with the additional information we need. (See Item 13, below, for any particular information or documentation we will need.)

☐ 6. Discrimination in violation of law is one of the prohibited personnel practices which the Special Counsel is authorized to investigate (5 U.S.C. 2302(b)(1)). However, the statute was not intended to divert all discrimination cases to this Office for investigation and thereby bypass or duplicate the procedures for such complaints already established in the agencies and in the Equal Employment Opportunity Commission.

☐ a. If you have not already filed a complaint with the agency, you may wish to contact the appropriate agency EEO official.

☐ b. We intend to monitor the processing of your complaint and will inform you of any action we take.

☐ c. Please write to us if you believe the agency is not processing your complaint in accordance with the applicable statutes and regulations.

☐ 7. We have determined that your allegations deal with matters that may be resolved more appropriately under an administrative appeals procedure or applicable grievance procedure. We, therefore, will not undertake an investigation in your case at this time. (5 U.S.C. 1206(e)(2)).

☑ 8. We are not authorized to take action on your allegations because the information you have provided does not indicate that a prohibited practice or any other activity prohibited by civil service law, rule, or regulation has occurred. We have marked the reason(s) for this determination below:

☑ a. No "personnel action" has been taken or is to be taken, as defined by the statute (see enclosed Summary).

☑ b. There is not sufficient evidence to indicate that a prohibited personnel practice as defined in the statute (see enclosed Summary), or other prohibited activity, has occurred.

☐ c. Nonselection for promotion is not subject to investigation unless there is evidence that activity prohibited by law, rule, or regulation is involved. If you believe a promotion was accomplished improperly, Section 1-6 of FPM Chapter 335 quoted below may apply:

"Employees have the right to file a complaint relating to a promotion action. Such complaints shall be resolved under appropriate grievance procedures. The standards for adjudicating complaints are set forth in Part 300 of title 5, Code of Federal Regulations. While the procedures used by an agency to identify and rank qualified candidates are proper subjects for formal complaints or grievances, nonselection from among a group of properly ranked and certified candidates is not an appropriate basis for a formal complaint or grievance. There is no right of appeal to the OPM but the OPM may conduct investigations of substantial violations of OPM requirements."

☐ 9. We are not authorized to take action on your allegations because the Civil Service Reform Act came into effect on January 11, 1979. The prohibited personnel practices, established thereunder do not apply to actions taken prior to that date (except for certain matters not relevant in your case).

☐ 10. No provisions of the Civil Service Reform Act relating to prohibited personnel practices do not apply to Government corporations, the FBI, the CIA, the Defense Intelligence Agency, the National Security Agency, the General Accounting Office, the U.S. Postal Service and Postal Rate Commission, employees of the Army and Air Force Exchange Service and similar non-appropriated fund activities (including Open Messes), or Government contractors.

☐ 11. The matters you have complained of are not within the jurisdiction of the Special Counsel. Therefore, we have referred your correspondence to:

☐ 12. You may wish to submit your allegations or concerns to:

☑ 13. Other:

Your concerns about the governments administration of the Health Benefits Program should be directed to the Office of Personnel Management, Associate Director, Compensation Group, 1900 E Street N.W., Washington, D.C. 20415.

B-17
Mr. Shigeki Sugiyama
Assistant Special Counsel

SUMMARY OF PROHIBITED PERSONNEL PRACTICES

NB: Since this is a *summary* of the prohibited personnel practices, section 2302 of title 5, United States Code, should be consulted if the specific statutory language is needed for any purpose.

Persons Protected by the Prohibited Personnel Practices

The employees and applicants protected by the prohibited personnel practices are those employees in and applicants for:

(1) any position in the *competitive service*, a *career appointee position in the Senior Executive Service*, or a position in the *excepted service* (with certain exceptions which is in—

(2) an Executive agency, the Administrative Office of the U.S. Courts, or the Government Printing Office—but is *not* in—

(a) a Government corporation;

(b) the FBI, CIA, DIA, NSA, and certain other intelligence agencies excepted by the President;

(c) the General Accounting Office; or

(d) the U.S. Postal Service and the Postal Rate Commission.

The Prohibited Personnel Practices

Any employee who has authority to take, direct others to take, recommend, or approve any *personnel action* (as defined below), shall not, with respect to such authority—

1. discriminate for or against any employee or applicant for employment on the basis of race, color, religion, sex, national origin, age, handicapping condition, marital status, or political affiliation;

2. solicit or consider any unauthorized recommendation;

3. coerce the political activity of any employee or applicant;

4. deceive or wilfully obstruct any person with respect to such person's right to compete for employment;

6. grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for the purpose of improving or injuring the prospects of any particular person for employment;

7. appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement any individual who is a relative of such employee to a position in the employee's agency over which the employee has jurisdiction or control;

8. take or fail to take a personnel action with respect to any employee or applicant as a reprisal for the employee or applicant's disclosure of information which the employee or applicant reasonably believes evi-

dences a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety—or for the exercise of any appeal right granted by any law, rule, or regulation;

9. discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others; or

10. take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of title 5, United States Code.

Personnel Actions Covered

The specific personnel actions covered by the prohibited personnel practices are:

1. an appointment;

2. a promotion;

3. a removal, suspension, reduction in grade or pay, a furlough of 30 days or less, or other disciplinary or corrective action;

4. a detail, transfer, or reassignment;

5. a reinstatement;

6. a reemployment;

7. a performance evaluation under chapter 43 of title 5, United States Code;

8. *a decision concerning* pay, *benefits,* or *awards*—or concerning education or training if the education or training may reasonably be expected to lead to any other action listed here; and

9. any other significant change in duties or responsibilities which is inconsistent with the employee's salary or grade level.

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OSC'S DENIAL OF RECONSIDERATION
Dated June 5, 1980

OFFICE OF THE SPECIAL COUNSEL
1717 H St., N.W.
Washington, D.C. 20119

June 5, 1980

Mr. Lawrence R. Rosano
2325 Paseo de Laura #220
Oceanside, CA 92054

In Reply Please
Refer To:
000535

Dear Mr. Rosano:

This is in response to your recent correspondence to this Office received on May 15 and May 19, 1980, requesting reconsideration of the matters you have previously brought to us. We have carefully reviewed the additional information you submitted to us and in the absence of any matter within our direct investigative jurisdiction, we do not have sufficient basis to inquire further into your allegations.

Although, we can certainly understand the basis for your personal convictions, we regret that we must reaffirm our April 3, 1980 decision.

Sincerely yours,

Shigeki J. Sugiyama
Assistant Special Counsel
(Investigation)

OPM'S RESPONSE TO THE MSPB APPEAL OF JUNE 12, 1980

United States of America
Office of Personnel Management
Washington, D.C. 20415

June 12, 1980

The Honorable S.I. Hayakawa
United States Senate
Washington, D.C. 20510

Dear Senator Hayakawa:

This is in reply to your letter in the interest of Mr. Lawrence R. Rosano of Oceanside, California concerning coverage for abortions under the Federal Employees Health Benefits (FEHB) Program.

It is our aim to provide for Federal employees, annuitants, and their covered dependents, the broadest coverage at the best premium possible. Some FEHB plans have always covered therapeutic abortions. Most of our plans now cover all abortions because of the trend to liberalizing state abortion laws. There is no religious discrimination because the Program offers all eligible employees access to the same types of benefits, including comprehensive surgical/medical benefits for pregnancy-related conditions under one or more plans, and the employer contribution is determined on the same basis for all employees.

One of the features of group insurance is that a person who enrolls in a plan pays premiums to support all the benefits of that plan—including benefits that the person knows he or she will not use and benefits to which the person may object for personal reasons. Some employees and annuitants are con-

cerned about population growth and object to maternity benefits; some who do not drink or use drugs object to benefits for treatments of alcoholism and drug abuse, and others who are mentally healthy object to benefits for treatment of mental illness.

If we were to eliminate all the benefits to which someone objects, and if plans could be tailored to needs of particular groups of people as indicated above, there would be no logical place to stop. The end result would be a simple health benefits program providing only limited hospital and surgical benefits. We feel that this would not be the kind of comprehensive health benefits coverage Congress intended, and would not be the kind of coverage most employees want.

Further, it is the opinion of the Office of Personnel Management's General Counsel that none of the funds which are transferred to OPM by Federal agencies as contributions for the Federal Employees Health Benefits Program insurance premium payments would properly be considered as having been used to perform abortions, notwithstanding the fact that various Federal Employees Health Benefits plans do provide coverage for abortions.

This view is shared by the General Accounting Office which, by letter to the House Committee on Post Office and Civil Service dated December 5, 1977, announced that:

> "All reimbursements to employees for hospitalization and other medical expenses are made by the carrier and not by the Federal Government. In other words, the fact that the Federal Government contributes to the cost of the insurance premiums does not mean that Federal appropri-

ations are being used to pay for the medical services covered under the health insurance contract."

I hope that this information will be helpful to you in responding to your constituent.

Sincerely yours,

William T. Smith, Chief
Program Services Staff
Office of Pay and Benefits Policy